SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1974

APR 11 1975

MICHAEL RODAK, JR., CLERK

No. 74-1279

MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CAREY McWILLIAMS and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of Homer McWilliams, Deceased, *Petitioners*,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY; JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI; LAKESIDE HOSPITAL ASSOCIATION; JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY; RESEARCH HOSPITAL AND MEDICAL CENTER; KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE; NORTHEAST OSTEOPATHIC HOSPITAL; SISTERS OF SAINT MARY (Owning and operating St. Mary's Hospital); KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER; CHILDREN'S MERCY HOSPITAL; MARTIN LUTHER KING, JR. MEMORIAL HOSPITAL; ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI; KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION; BAPTIST MEMORIAL HOSPITAL and INDEPENDENCE SANITARIUM AND HOSPITAL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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No. _____

MARY ELIZABETH BLETHROADE SUTT, et al.,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Missouri in the case of *The First National Bank of Kansas City* v. *John C. Danforth, Attorney General of Missouri, et al.*

OPINION BELOW

The Opinion and judgment of the Supreme Court of Missouri, ... S.W. 2d ....., as yet unreported, appears in Appendix A, *infra*, pages A1-31. The Opinion and judgment of the Circuit Court of Jackson County, Missouri, is unreported and appears, so far as material, in Appendix B, *infra*, pages A32-44.

The judgment of the Supreme Court of Missouri sought to be reviewed was entered on January 13, 1975.

Motions for rehearing, or in the alternative for transfer to the Missouri Supreme Court, en banc, of Petitioners

and others, were overruled on February 10, 1975. The overruling of said motions for rehearing, or in the alternative for transfer to the court, en banc, exhausted judicial remedies available to Petitioners in the State of Missouri, and the judgment herein became the final judgment of the highest court of this State. *Lucas* v. *Manufacturing Lumbermens Underwriters*, 349 Mo. 835, 163 S.W. 2d 750.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1257 (3). Petitioners and other defendants have asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution and statutes of the United States.

QUESTIONS PRESENTED

This Declaratory Judgment Action was brought by The First National Bank of Kansas City, designated trustee in a purported public charitable trust, perpetual in nature, for benefit of two classes of beneficiaries: (1) Protestant Christian Hospitals operated and maintained on nonprofit basis in territory now constituting Jackson County, Missouri, and (2) and/or in contributing to the maintenance and support and care of sick and infirm patients in said hospitals, born of white parents in the United States of America. Petitioners, the Attorney General of Missouri and 23 hospitals were joined as necessary parties and challenged the trust as in violation of the First and Fourteenth Amendments, Federal Civil Rights laws and as promoting racial and religious discrimination. The trial court overruled all objections, took evidence, selected four of the twenty-three hospitals as presently meeting the

religious restrictions and authorized trustee to distribute income to these hospitals and certain patients in same born of white parents. It retained supervisory control of the trust and ordered annual reports. The Missouri Supreme Court affirmed the trial court, overruled all contentions the trust was racially and religiously discriminatory and held that even if racial and religious discrimination, or both, be present, no "state action" was involved. By so doing:

1. Is the state enforcing racial and religious discriminations contrary to the Fourteenth and First Amendments and civil rights laws in selecting beneficiaries under and upholding the perpetual *per se* discriminations of this trust?

2. Is the state furnishing a plan for and encouraging and enforcing racial and religious discriminations contrary to the Fourteenth and First Amendments and civil rights laws in holding a charitable, perpetual trust is "public", to keep it from being void as in violation of the rule against perpetuities, and at the same time "private", because The First National Bank (not being a public body or a governmental body) is trustee, to allow perpetual racial and religious discriminations?

3. Where the trial and supreme courts of Missouri acted in their official capacities in the performance of state functions, where the Missouri Attorney General was joined as a necessary party, where evidence was taken and considered and it was found that only four of 23 hospitals involved presently qualified as "Protestant Christian Hospitals" and that they and certain patients in said hospitals "born of white parents" were proper beneficiaries, sponsoring *per se* racial and religious discrimination perpetually, has the state become involved in operation of the public charitable trust to such an extent as to constitute

state action in enforcing and allowing racial and religious discriminations contrary to the Fourteenth and First Amendments and the civil rights laws?

4. Will this Missouri Supreme Court decision sabotage enforcement of federal constitutional and statutory civil rights laws by withdrawing all public charitable trusts from jurisdiction of the courts which have "private" trustees?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Constitutional Amendments are found in the West Publishing Company's United States Code Annotated. The First Amendment is found on page 19 of the first Volume on Amendments and is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment is found on page 4 of Volume on Amendments "14 to End" and Section one is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1983, is found on page 250 of Volume 42 of U.S.C. entitled Sections 1891 to 1984, and is as follows:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The State of Missouri Constitutional provisions here pertinent are found at pages 318 and 321 in Volume 1A of Vernon's Annotated Missouri Statutes. Article 4, Sec. 37 provides:

"§ 37. Department of public health and welfare—duties and powers of general assembly.

Section 37. The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

Article 4, Sec. 39, found at page 321, provides:

"§ 39. Cooperation with federal and other state governments

Section 39. In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states."

Sec. 474.430 of the Missouri Statutes is found in Volume 26 of Vernon's Annotated Missouri Statutes at page 698, and is as follows:

"474.430 Court to conform to directions of will

All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them. (l.1955, p. 385, § 272.)"

Rule 87.08 of Missouri Rules of Civil Procedure is found on page 70 of Vernon's Annotated Rules in volume entitled "85 to End" and is as follows:

"87.08 Form and Effect of Declaratory Judgment

A declaratory judgment may be either affirmative or negative in form and effect; and shall have the force and effect of a final judgment or decree."

Rule 87.10 is found on page 72 of the same volume "85 to end" and is as follows:

"87.10 Further Relief May Be Granted, When—Procedure

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith."

STATEMENT

(The Designation "5T 46" Refers To Volume 5
Of The Transcript, Page 46.)

This is a suit for declaratory judgment brought by The First National Bank of Kansas City, Missouri, as Executor of the estate of Homer McWilliams, deceased, and designated Trustee of a proposed testamentary public charitable trust outlined by Testator in his will, seeking constructions of that part of his Will pertaining to the testamentary trust and for instructions from the court as to administration of said purported trust. (5T 46) The facts in this case are not in dispute. The parties defendant to the action were the Attorney General of Missouri, in his official capacity, 23 public hospitals in Jackson County, Missouri (App. B, pp. A33, 34), who might qualify as beneficiaries and these Petitioners, Heirs and Unknown Heirs of Homer McWilliams, deceased.

We have little in the record of the history of Homer McWilliams. We know he was born in Chillicothe, Missouri, on July 18, 1867, and died in Kansas City, Missouri, on December 21, 1965, at the age of 98 years. (4T 605) His father was born in Florida and his mother in Missouri. We know that he was a bachelor and a Protestant. We know he was in the real estate business and amassed a great fortune indicating superior business ability and resourcefulness. The last years of his life, he lived in Trinity Lutheran Hospital in Kansas City, Missouri. (4T 606)

In 1934, Testator executed his will containing provision for creation of a testamentary public charitable trust.

In 1946, after spending 10 years in Florida, he returned to Kansas City and executed a codicil to his will which is for consideration in this case.

In his original will and codicil, he named as beneficiaries 10 of his relatives and some other persons and in both left his residuary estate in trust for the following purposes, quoted from said codicil: (5T 37, 38)

> "'Subject to the payment of the bequests and sums given to respective persons herein named, I direct that the net income from the Trust Estate or such portion as shall be required, shall, at the end of each year, be used, first, as an addition to the principal of the Trust Estate, in case of loss or depreciation of the Trust Estate, so as to restore the value of the corpus of the Trust Estate to an amount equal to its original value at the time it was received by and came into the hands of the Trustees, the rest and remainder of said net income be used annually by the Trustees and their successor in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. My Trustees shall not be confined nor limited in such contributions to such Hospitals as may be in existence at the time of my death, but may contribute to such hospitals of the character named, afterwards organized and in existence, and to the maintenance, support and care of patients of the class and character named in such hospitals. And I give my said Trustees, their survivors and successors, full power and authority to select, and to give these benefits of this Trust, and to make such distributions to, such Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of the Trustees, then acting as they,

their survivor and successor or successors, shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid. Since it is my desire that the corpus of the Trust shall be at all events and under all conditions and circumstances maintained and preserved at not less than its original value, I direct that the Trustees shall so distribute and expend the Annual net income of said Trust Estate, only after making all conservative replacements and allowances for loss, depreciation, deterioration, and for the shrinkage in value of the principal of the Trust.' "

It should be noted this trust is designed for perpetual existence to be always maintained at the original level of its basic capital.

The trial court found the Testator used the term "and/or" in the conjunctive sense—that is, in an inseparable combination. (App. B, p. A39)

The will and codicil show they were executed under the supervision of a named lawyer and he was carried along in the codicil. The same prestigious law firm still represents the Trustee, indicating Testator knew he could change his will if he desired at all times, had available competent legal counsel, had he intended to make any other changes in his will and testamentary trust.

Testator lived over 31 years after making his will and over 19 years after executing the above codicil thereto, without making any additional changes in either said will or codicil. (5T 136) Further, not one bit of evidence was introduced by anyone indicating or even suggesting mental incapacity on the part of Testator at any time prior to his death or showing any "general, charitable intent" on Tes-

tator's part contrary to the intent specifically and definitely limited as to race, birthplace and religion set out in Testator's will and the codicil quoted above. The Missouri Supreme Court (App. A, p. A11) held that Testator had a dominant, specific and *limited* charitable purpose in creating this trust.

The net value of Testator's estate at the time of his death was $8,485,891.22 and at the time of the trial it had increased to the sum of $11,392,703.00. (App. A. p. A2)

The Trustee of the purported charitable trust, which the trial court found to be "a national banking association duly organized and existing according to law" (App. B. p. A33), instituted this action seeking the aid of the State Court in these words: (App. C. pp. A49, 50)

> "* * * that this plaintiff is now in a position to carry out the purposes of both trusts, and its obligations under both of said trusts, but is prevented from doing so because it cannot, with certainty and exactness, construe some of the language used by Testator in his Last Will and Testament, and the First Codicil thereto, setting out the rights and duties of this plaintiff."

Defendants, in the trial court, challenged this trust as promoting racial and religious discrimination in violation of the First and Fourteenth Amendments to the Constitution of the United States and Federal Civil Rights Statutes. The trial court held (App. B. pp. A38, 40, 41) the purported testamentary trust was valid and a public charitable trust; selected four, and only four, of the 23 licensed public hospitals presently in Jackson County, Missouri, as qualified for selection by the Trustee as beneficiaries because of their special relationship to or control by a Prot-

estant Christian Church and authorized the Trustee to distribute income from the trust to these hospitals and to certain patients in said hospitals "born of white parents." (App. B. pp. A39, 40) The four hospitals so designated were Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium. The trial court specifically overruled all Federal, Constitutional and Civil Rights objections of all parties and held that "the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion." (App. B. pp. A40, 41) During the trial, however, the court described this trust in these words: (5T 162)

> "So I will not comment on that other than to say that the Court has been aware of the fact that the testator's Will might well have furnished a charter for the Klu Klux Klan. Every prevalent prejudice of the era in which it was written was expressed. I am sure there were other prejudices, but all the major prejudices were expressed in it. And in consideration of the matter, this Court has come to the conclusion that the testator has a right so to do if he did not invoke governmental action of any kind."

The trial court included in his final judgment the following: (App. B. p. A44)

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Court retains supervisory control over the administration of the two trusts created by the Last Will and Testament and the First Codicil thereto of Homer McWilliams and orders and directs the Trustee to file herein an annual report, within 90 days after the close of each calendar year, setting out an accounting for each of said trusts for each such calendar year."

Petitioners and many of the 23 hospitals, except for the four named above who were held to be proper beneficiaries, appealed to the Missouri Supreme Court, alleging the enforcement of the trust was in violation of the United States Constitution, Amendments I and XIV, and the Missouri Constitution (App. A. pp. A9, 10, 11), because of discrimination based on race and religion. The Missouri Attorney General appealed as to the unlawful discrimination based on race and contended there was the requisite state action. (App. A. p. A12) The Missouri Supreme Court overruled all of the above contentions, affirmed the decision of the Trial Court and held: (App. A. pp. A19, 20)

> "* * * even if it be assumed that racial discrimination or religious discrimination, or both, be present, such discrimination in the administration of this trust is not illegal under the Fourteenth Amendment because 'state action' is not involved."

Regarding this perpetual trust, the Missouri Supreme Court further held: (App. A. p. A22)

> "Under the facts of this case, 'state action' was not involved in the creation of the trust, nor is it required to carry out its terms. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The Trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion."

In reaching the above conclusion, the Missouri Supreme Court found: (App. A. p. A22)

> "No public body is involved in the latter selection because payments to any beneficiaries would flow directly from the trustee to them."

In overruling contentions the courts, in construing this trust, engaged in sponsoring, promoting or enforcing discrimination, the Missouri Supreme Court held: (App. A. p. A23)

> "* * * the court was asked to determine only the hospitals intended by the testator to be identified. The court was not asked to direct the trustee nor to execute the trust, nor to choose beneficiaries."

The aforesaid opinion of the Circuit Court of Jackson County, Missouri, the trial court, was affirmed by judgment of the Supreme Court of Missouri entered on January 13, 1975. Motions for a rehearing or in the alternative to transfer this cause to Court en Banc, filed by petitioners, the Attorney General of Missouri and Lakeside Hospital Association, et al., were overruled on February 10, 1975. (App. E. pp. A60, 61)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Federal Constitutional questions raised under the First and Fourteenth Amendments to the Constitution by petitioners and others were expressly overruled by the trial court (App. B. pp. A40, 41), and by the Missouri Supreme Court. (App. A. pp. A19, 20, 21, 22)

This Court has held that where both trial court and appellate courts have passed upon the Constitutional questions, this Court would consider the Federal Constitutional questions properly raised and presented. *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 91 S. Ct. 628 (1). *Jenkins* v. *Georgia,* 94 S. Ct. 2750 (6).

The Constitutional question of equal protection under the Fourteenth Amendment was raised by the Attorney General, in his answer in the trial court (5T 46, par. 12) and likewise by these Petitioners in their answers. (5T 63, 102-103, 115-116, 129-132)

The Constitutional question of religious discrimination under the First Amendment was raised in the answers of the following parties in the trial court:

Lakeside Hospital Association (5T 69, 70);

Kansas City College of Osteopathic Medicine (5T 76);

Northeast Osteopathic Medicine (5T 80, 81);

Children's Mercy Hospital (5T 85, 86);

Kansas City General Hospital (5T 89);

Independence Sanitarium and Hospital (5T 95);

Sisters of St. Mary (5T 108).

These Petitioners briefed the issues under the First Amendment (Point V, pp. 67 to 73) and under the Fourteenth Amendment (Point IV, pp. 60 to 67), of their main printed brief in the Missouri Supreme Court.

These Petitioners renewed their constitutional objections in their Motion for Rehearing or, in the alternative, to transfer to the Court, en Banc, as to the Fourteenth Amendment (3b pages 2-3, p. 11, par. 4 of said Motion) and as to the First Amendment, page 15, par. 8 of said Motion and complained of conflict of said opinion with controlling decisions of this court on pages 4, 10, 11, 13, 16 and 17.

The Separate Motion for rehearing or transfer to the Court, en Banc, of the Attorney General was devoted to demonstrating violation of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of this court on important Constitutional and Civil Rights issues.

I.

This Trust's Racial and Religious Discriminations Are Per Se and Under All Circumstances Unconstitutional, Null and Void.

This case involves enforcement by the state of racial and religious discriminations in violation of the First and Fourteenth Amendments. The State has here taken affirmative action designed to make private discriminations legally possible.

The use of a privately owned national bank as trustee was held to have changed the situation from one where it was restricted to one where discrimination is encouraged.

Petitioners submit the ruling of the Missouri Court on such issues is in conflict with the following controlling decisions of this court:

> *The Civil Rights Cases,* 109 U.S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 815, 835, 839; *Shelley* v. *Kraemer,* 334 U.S. 1, 15, 68 S. Ct. 836, 842; *Hurd* v. *Hodge,* 334 U.S. 24, 34, 68 S. Ct. 847, 852; *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 419, 88 S. Ct. 2186; *Reitman* v. *Mulkey,* 387 U.S. 369, 375, 87 S. Ct. 1627, 1631; *Evans* v. *Newton,* 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 143, 146; *Evans* v. *Abney,* 396 U.S. 435, 90 S. Ct. 628; *Kreshik* v. *Saint Nicholas Cathedral,* 383 U.S. 190, 191, 80 S. Ct. 1037, 1038.

It is the position of these petitioners that this trust has to be classed as a public charitable trust or a private

charitable trust, one or the other, and that it cannot be both at the same time, the Court's opinion in that respect being repugnant and self-destructive.

In the case of *Fredonia Broadcasting Corporation, Inc.* v. *RCA Corporation*, 5 Cir., 481 F. 2d 781, the Court said: (l.c. 801)

> "However, a judgment cannot be supported by inconsistent theories if one theory precludes the other or is mutually exclusive of the other. Cf. Telex Corporation v. Balch, 8 Cir., 1967, 382 F. 2d 211, 213."

The law of Missouri is in accord: *Wenzel* v. *Wenzel*, Mo. App., 283 S.W. 2d 882, 887 (8); *Buschow Lumber Co.* v. *Union Pac. R. Co.*, 230 Mo. App. 243, 276 S.W. 410, 414 (20).

We challenge the Supreme Court's statement (App. A. p. A20) that religious discrimination here is "at most arguable."

In the case of *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 15, 67 S. Ct. 504, the Court said: (l.c. 511)

> "[8-11] The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

This trust clearly aids one religion and prefers one religion over all others, a proceeding condemned by this Court as above. Considered as a public charitable trust, as the court designates it, it is null and void as being in violation of the First and Fourteenth Amendments to the Constitution of the United States as promoting racial and religious discrimination under color of State Law.

In the *Civil Rights Cases*, 109 U.S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 835, this Court said: (l.c. 839)

> "The 1st section of the 14th Amendment, which is the one ruled on, after declaring who shall be a citizen of the United States, and of the several states, is prohibitory in its character and prohibitory upon the states. * * *
>
> It nullifies and makes void all state legislation of every kind which invades the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of the law, or which denies to any one of them the equal protection of the law."

In the leading case of *Shelley* v. *Kraemer*, 334 U.S. 1, 15, 68 S. Ct. 836, this Court said: (l.c. 842)

> "In the Civil Rights Cases, 1883, 109 U.S. 3, 11, 17, 3 S.Ct. 18, 21, 27 L.Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'state authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.
>
> "Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided."

See to like effect: *Kreshik* v. *Saint Nicholas Cathedral*, 383 U.S. 190, 191, 80 S. Ct. 1037, 1038.

In the case of *Hurd* v. *Hodge*, 334 U.S. 24, 34, 68 S. Ct. 847, the Court said: (l.c. 852)

> "[10, 11] But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."

We submit the judgments of the Missouri courts herein are in direct conflict with and in violation of the law and public policy of the United States to restrict and limit racial and religious discrimination.

In the case of *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 419, 88 S. Ct. 2186, the Court said: (l.c. 2192)

> "The basic source of the injury in *Hurd* was, of course, the action of private individuals—white citizens who had agreed to exclude Negroes from a residential area. But an arm of the Government—in that case, a federal court—had assisted in the enforcement of that agreement."

In this case two arms of the State Government, Judicial and Executive, are assisting in enforcement of this testamentary trust with its racial and religious discriminations.

In the case of *Reitman* v. *Mulkey*, 387 U.S. 369, 375, 87 S. Ct. 1627, the Court said: (l.c. 1631)

> "Also of particular interest to the court was Mr. Justice Stewart's concurrence in Burton v. Wilmington Parking Authority, 365 U.S. 715, 726, 81 S. Ct. 856, 862, 6 L.Ed. 2d 45, where it was said that the Delaware statute as 'authorizing' racial discrimination in restaurants and that the statute was therefore invalid. To the California court '[t]he instant case presents an undeniably analogous situation' wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted 'to one wherein it is encouraged, within the meaning of the cited decisions'; § 26 was legislative action 'which authorized private discrimination' and made the State 'at least a partner in the instant act of discrimination * * *.' The court could 'conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination * * *.' The judgment of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.
>
> There is no sound reason for rejecting this judgment."

We submit the state of Missouri, through its courts and Attorney General, has taken affirmative action designed to make private discrimination legally possible. The judgment herein was designed to change the situation in which discrimination was restricted to one where it was favored.

Considered as a private trust, this instrument is null and void as being in violation of the rule against perpetuities. Under its express terms the amount of its capital is to be kept at its original level forever. It also is designed to apply to generations of individual beneficiaries yet to be born in the indefinite future and to hospitals to be organized throughout future time.

In the case of *Buchanan* v. *Kennard*, 234 Mo. 117, 136 S.W. 415, the Court said: (l.c. 418)

> "[1, 2] Although the first two of the foregoing propositions are not controverted, it may be said with reference to them that the testator evidently sought and intended to create a public charity by the devises and bequests of Item 18 of the will. That purpose plainly appears from these two provisions of the bequest; (1) The objects of the charity are indefinite, vague, and uncertain. (2) The grant to the trustees is made in perpetuity. Both of these provisions are recognized as valid—the first an essential—in a public charity, while either of them would render invalid a devise or bequest intended as a private trust. Therefore it is apparent and that this bequest cannot be upheld as a private trust, and that it must be upheld, if at all, as a public charity."

See to like effect, *Nelson* v. *Mercantile Trust Co.*, Mo. Sup., 335 S.W. 2d 167 (2, 3); *Loud* v. *St. Louis Union Trust Co.*, 298 Mo. 148, 249 S.W. 629, 639.

CY PRES AND DEVIATION ARE UNAVAILABLE UNDER THE FACTS OF THIS CASE.

The Attorney General and some other parties have stated they thought they could detect a general charitable intent in this will but none of them have ever been able

to point to anything in this record tending to support such wishful thinking. The evidence is all to the contrary. This classification of beneficiaries was originated in Testator's will of 1934 and was repeated and continued in his codicil of 1946, and so remained for 31 years until his death.

Testator here was likewise set in his opinions and demonstrated and stated exactly what he wanted. He put his prejudices in his will in 1934, repeated these in his codicil in 1946, and during the remaining 19 years of his life, living in Kansas City in the center of civil rights litigation. Including the *Brown School* case at Topeka, Kansas, 1951, 98 F. Supp. 797, 347 U.S. 483, 74 S. Ct. 686 (1954); *The Kansas City Swimming Pool* case, 104 F. Supp. 848, 1952, affirmed, Eighth Circuit Court of Appeals, 205 F. 2d 47 (1953); *The St. Louis Restrictive Covenants* case; *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 736 (a St. Louis, Mo. case) (1948), he stayed with his original plan, showing the same type of determination as Senator Bacon.

Under Missouri law, Cy Pres and Deviation are applicable only when they are not inconsistent with existing law (*Taylor* v. *Baldwin*, 362 Mo. 1224, 247 S.W. 2d 741, 749) and do not change the purposes intended (same case 247 S.W. 2d 750). Under Missouri law these doctrines are not applicable in situations, such as here presented, where it is patently clear that the settlor intended to aid that kind of charity only and in a particular way or by a particular method or means. *Ramsey* v. *City of Brookfield*, 361 Mo. 867, 237 S.W. 2d 143, 146.

Any attempt to apply Cy Pres or Deviation to the facts of this case would bring it into direct and irreconcilable conflict with the opinion of this Court in the case

of *Evans* v. *Abney*, 326 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634, a case closely in point on this issue.

In the case of *Schoene* v. *Hickam*, Mo. Sup., 397 S.W. 2d 596, the Court said: (l.c. 602)

> "The reason is that valid and enforceable contracts may not arise out of transactions prohibited by the statutory law. Gilbert v. Edwards, Mo.App., 276 S.W. 2d 611 [14]. 'The illegality inhering at the inception of such contracts taints them throughout and effectually bars enforcement.' Garvin v. Gordon, 36 N.M. 304, 14 P. 2d 264, 266 [3]. As stated in Mueller v. Burchfield, 359 Mo. 876, 224 S.W. 2d 87, l.c. 88, 13 A.L.R. 2d 153: 'The reason for denying relief to a person suing on a contract where a license is required and none is obtained is that the law will not aid such person in enforcing a contract which he had no right to make.' The court quoted from McDearmott v. Sedgwick, 140 Mo. 172, 39 S.W. 776, in which it was said, l.c. 778: 'The principle is well settled that 'no court will lend its aid to a man who founds his cause of action upon an * * * illegal act.' This is a principle founded upon public policy, 'not for the sake of the defendant, but for the law's sake, and that only.' "

This purported public charitable trust is illegal, void and unconstitutional by reason of racial and religious discrimination and the rule against perpetuities and is in conflict with the opinion of this Court in the case *Evans* v. *Abney*, 326 U.S. 435, 90 S. Ct. 628, holding to the contrary, under similar circumstances, that the public charitable trust must fail and the corpus of the trust be restored to the estate of the Trustor.

II.

The Opinion of the Missouri Supreme Court Holding the Evidence of State Action Does Not Reach a Level Sufficient to Implement Federal Constitutional and Statutory Laws Against Racial and Religious Discrimination Is in Irreconcilable Conflict with Controlling Decisions of This Court.

A. The Rulings of the Missouri Supreme Court That Use of a "Privately Owned Bank" As Trustee Separated and Brought an End to the State Action of the Supreme Court and Attorney General and Licensed the Trustee and Public Charitable Hospitals to Practice Racial and Religious Discrimination in Perpetuity at the "Unlimited Discretion" of the Trustee, Are in Direct and Irreconcilable Conflict with the Following Controlling Opinions of This Court:

Evans v. *Newton*, 382 U.S. 296, 299, 86 S. Ct. 486, 489; *Evans* v. *Abney*, 396 U.S. 435, 438-447, 90 S. Ct. 628, 629, 630, 633, 634, 635; *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1604-5; *Reitman* v. *Mulkey*, 387 U.S. 369, 87 S. Ct. 1627 (4, 5).

See also *Commonwealth of Pennsylvania* v. *Brown*, 3 Cir., 392 F. 2d 120, 125, Cert. Den. 391 U.S. 921, 88 S. Ct. 1811, 20 L. Ed. 2d 657.

Here, the Missouri Supreme Court has held a perpetual trust, which it found to be a public charitable trust, is at the same time a private trust for purposes of allowing religious and racial discrimination.

In the *Evans* v. *Newton* case, Senator Bacon devised a tract of land to the City of Macon, Georgia, to be used

as "park and pleasure ground" for white people only. The will provided it should be under the control of a board of managers of seven persons, all white. The City kept the park segregated for some years but later let negroes use it. Individual members of the Board of Managers brought suit against the City of Macon and the trustees of Senator Bacon's Estate asking that the city be removed as trustee and that the court appoint new trustees. The City resigned as trustee. The heirs of Senator Bacon intervened and asked for reversion of the property to the Bacon Estate.

The Georgia Court accepted the resignation of the City as trustee and appointed three individuals. The negro interveners appealed. The Georgia Court held Senator Bacon had a right to give and bequeath his property to a limited class (The Missouri Court so held in this case) and a court of equity had a right to appoint new trustees. Interveners appealed and the case came to this Court on writ of certiorari. In reversing the judgment below, this Court said: (86 S. Ct. 488 and 489)

"We have also held that where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152. That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitation.

"[6-8] Yet generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (Burton v. Wilmington Parking Authority supra, 365 U.S. at 722, 81 S. Ct. 856, 6 L. Ed. 2d 45) can

> we determine whether the reach of the Fourteenth Amendment extends to a particular case."

(l.c. 489)

> "The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility.
>
> "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."

Here the public charitable hospitals were well established and the momentum they have acquired as public institutions will not likely be dissipated by a "private" trustee.

In the case of *Braden* v. *University of Pittsburgh*, 3 Cir., 477 F. 2d 1, the Court said: (l.c. 7)

> "As was said by Judge Friendly in Powe v. Miles, 407 F. 2d 73, 83 (2 Cir. 1968), 'The confiding of certain duties to private individuals no more insulates the State * * * [utilizing private trustees to administer a state activity] than in Kerr v. Enoch Pratt Free Library, supra [149 F. 2d 212 (4 Cir. 1945)].'"

In the case of *Evans* v. *Abney*, 396 U.S. 435, 436, 90 S. Ct. 628, the *Evans* v. *Newton* case came once again before this Court. This Court said: (l.c. 629)

> "[1] Once again this Court must consider the constitutional implications of the 1911 will of United States Senator A. O. Bacon of Georgia which conveyed property in trust to Senator Bacon's home city of Macon

for the creation of a public park for the exclusive use of the white people of that city. As a result of our earlier decision in this case which held that the park, Baconsfield, could not continue to be operated on a racially discriminatory basis, Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator. 224 Ga. 826, 165 S.E. 2d 160 (1968). Petitioners, the same Negro citizens of Macon who have sought in the courts to integrate the park, contend that this termination of the trust violates their rights to equal protection and due process under the Fourteenth Amendment. We granted certiorari because of the importance of the questions involved. 394 U.S. 1012, 89 S. Ct. 1628, 23 L. Ed. 2d 38 (1969). For the reasons to be stated, we are of the opinion that the judgment of the Supreme Court of Georgia should be, and it is, affirmed."

See also *Commonwealth of Pennsylvania* v. *Brown*, 3 Cir., 392 F. 2d 120, 126, Cert. Den. 391 U.S. 921, 88 S. Ct. 1811, 20 L. Ed. 2d 657.

In the case of *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 152, 90 S. Ct. 1598, this Court said: (l.c. 1604)

"[7, 8] As noted earlier we read both counts of petitioner's complaint to allege discrimination based on race in violation of petitioner's equal protection rights. Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because

of his race or the race of his companions, or in any way act to compel or encourage racial segregation."

(l.c. 1605)

"Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' United States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157 (1966)."

We submit the Opinion of the Missouri Supreme Court in this case is in direct conflict with those controlling decisions of this Court on similar facts and decided it in a way not in accord with those decisions and other controlling decisions of this Court, in this field.

B. The Ruling of the Missouri Supreme Court That the Activities Herein of the Attorney General, the Trial Court and Supreme Court in a State Judicial Proceeding Involving State Public Charitable Functions Did Not Reach the Level of State Action to Permit Implementation of Federal Constitutional and Statutory Laws Restricting Racial and Religious Discrimination Is in Direct and Irreconciliable Conflict with Controlling Decisions of This Court in the Following Cases:

Shelley v. *Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842; *United States* v. *Guest*, 383 U.S. 745, 755, 756, 86 S. Ct. 1170, 1177; *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 170-171, 90 S. Ct. 1598, 1615.

In the case of *Parsons* v. *Childs*, 345 Mo. 689, 136 S.W. 2d 327, in discussing the law as to charitable trusts, the Court said: (l.c. 330)

> "The protection of such trusts has been, from the earliest time, a principal function of courts of equity. Dickey v. Volker, 321 Mo. 235, 11 S.W. 2d 278, 62 A.L.R. 858; Crow ex rel. v. Clay County, 196 Mo. 234, 95 S.W. 369; Estate of Peabody, 154 Cal. 173, 97 P. 184; Bogert on Trusts & Trustees, Vol. 2, page 1130, section 369; American Jurisprudence, Vol. 10, page 593, section 12."

In the case of *State ex rel. Kenney* v. *Johnson*, 229 Mo. App. 16, 68 S.W. 2d 858, the Court said: (l.c. 860)

> "[1] Under the common law, courts of equity had the inherent right and power to exercise jurisdiction over trust estates, which, of course, carried with it the right to appoint trustees, take and approve bonds, supervise the administration of the trust estate by the trustee, and to make all orders necessary for the preservation and conservation of the trust property for the use and benefit of the beneficiaries.
>
> This jurisdiction has been recognized and aptly referred to by many of our courts as an ancient head of equity jurisdiction. Brandon v. Carter, 119 Mo. 572, 24 S.W. 1035, 41 Am. St. Rep. 673; State ex rel. v. Muench, 217 Mo. 124, 117 S.W. 25, 129 Am. St. Rep. 536."

See to like effect: *First National Bank of Kansas City* v. *Mercantile Bank & Trust Co.*, Mo. Sup., en Banc, 396 S.W. 2d 164, 168 (3, 4).

The Attorney General of Missouri is a necessary party to litigation, such as this, involving a public charity in

the state. *Thatcher* v. *City of St. Louis*, 343 Mo. 504, 122 S.W. 2d 915 (1). The Attorney General is in this case in his official capacity and puts the State of Missouri itself directly into the case as a party. *Klaber* v. *O'Malley*, Mo. Sup., 90 S.W. 2d 396 (2, 3); *State ex rel. Eagleton* v. *Patrick*, Mo. Sup., 370 S.W. 2d 254, 256 (1).

Public health and welfare is a public function of such great importance it is included in its state constitution. Art. 4, Sections 37, 39, Mo. Const., 1945.

In the leading case of *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, this Court said: (l.c. 842)

> "[5] That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Commonwealth of Virginia* v. *Rives*, 1880, 100 U.S. 313, 318, 25 L. Ed. 667, this Court stated: 'It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In *Ex parte Commonwealth of Virginia*, 1880, 100 U.S. 339, 347, 25 L. Ed. 676, the Court observed: 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' In the *Civil Rights Cases*, 1883, 109 U.S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties

therein contained, and extends to manifestations of 'state authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining* v. *New Jersey*, 1908, 211 U.S. 78, 90, 91, 29 S. Ct. 14, 16, 53 L. Ed. 97, the Court said: 'The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state.' In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 1930, 281 U.S. 673, 680, 50 S. Ct. 451, 454, 74 L. Ed. 1107, the Court, through Mr. Justice Brandeis, stated: 'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking."

In the case of *United States* v. *Guest*, 383 U.S. 745, 755, 756, 86 S. Ct. 1170, this Court said: (l.c. 1177)

"[10] This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. (Citing cases)"

"[11] This case, however, requires no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause. This is so because, contrary to the argument of the litigants, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss."

See to like effect: *Mayers* v. *Ridley*, U.S. App. D.C., 465 F.2d 630, 638.

We submit a proceeding of this magnitude involving the Attorney General and the Supreme Court clearly attains the "level that state action must attain in order to create rights under the Equal Protection Clause."

In the case of *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 170-171, 90 S. Ct. 1598, the Court said (l.c. 1615):

"In Baldwin v. Morgan, *supra*, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do so.*' *Id.*, 287 F. 2d at 755-756 (emphasis added). We think the same principle governs here.

"[26, 27] For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law."

The opinion of the Supreme Court of Missouri in this case becomes the law of the case and, if allowed to stand, it will be the duty of the Trustee to carry out the expressed illegal and discriminatory intent of the Testator.

C. The Ruling of the Missouri Supreme Court That in This Declaratory Judgment Action the Court Was Not Asked to "Enforce Discrimination" and Was Not Asked "to Implement Its Holding by Affirmative Judicial Action" and Therefore Failed to Reach the Necessary Level of State Action to Implement Federal, Constitutional and Statutory Restrictions on Racial and Religious Discrimination Is in Direct and Irreconcilable Conflict with the Following Controlling Opinions of This Court:

Reitman v. *Mulkey*, 387 U.S. 369, 375, 87 S. Ct. 1627, 1631; *Richardson* v. *Ramiriz*, 94 S. Ct. 2655, footnote 13; *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1615; *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842; *Evans* v. *Abney*, 396 U.S. 435, 443, 90 S. Ct. 628, 633; *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549, 92 S. Ct. 1113, 1120, footnote 16.

The case of *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, as here arises out of terms of an instrument which was in violation of Federal laws. The Court there said: (l.c. 842)

> "But here there was more. These are cases in which the purposes of the agreement were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."

Here the racial and religious restrictions were so open and glaring the Trustee found it necessary to institute

this suit in the hope of obtaining favorable judicial approval of such terms.

In the case of *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 415, 88 S. Ct. 2186, 2190, in footnote 13, this Court said: (l.c. 2190)

> "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. (citing cases)"

The law of Missouri is in accord.

Section 527.010 V.A.M.S. provides that in a declaratory judgment case "such declarations shall have the force and effect of a final judgment or decree."

Section 527.080 provides for "supplemental relief" in a declaratory judgment case.

The fact that the trial court did not immediately award peremptory relief in this declaratory judgment suit is not material to the issues of state action or no state action.

In the case of *Richardson* v. *Ramirez*, 94 S. Ct. 2655, in a declaratory judgment suit, this Court said on page 2665, in footnote 13:

> "And it is well settled that, where there is 'an actual and acute controversy,' an appeal from a declaratory judgment of a state court presents a 'case or controversy' within this Court's jurisdiction. Nashville, Chattanooga, & St. Louis R. Co. v. Wallace, 288 U.S. 249, 53 S. Ct. 345, 77 L.Ed. 730 (1933). Indeed, any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U.S.C. § 1257, to invalidate

state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court.

We are equally unable to accept the view of the dissenters that the California court's failure here to issue the peremptory writ must rest on that court's resolution of some unspecified state law question against petitioner. The mere failure of a state court to award peremptory relief in a proceeding which it treats as one for a declaratory judgment is not an 'adequate state ground' which precludes our review of its federal constitutional holding."

In the case of *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 150, 90 S. Ct. 1598, the court said: (l.c. 1615)

"In Baldwin v. Morgan, *supra*, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do so.*' *Id.*, 287 F. 2d at 755-756 (emphasis added). We think the same principle governs here.

"[26, 27] For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law."

Here the Supreme Court, speaking for the State of Missouri, has provided by its judgment herein that the federal and constitutional and statutory provisions against racial and religious discrimination shall not be held applicable to this public charitable trust.

In the case of *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, the Court said: (l.c. 845)

> "[10-12] The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures."

Here enforcement of this discriminatory trust is being directed by "the highest court in the State."

On page 19 of its opinion, the Missouri Supreme Court attempts to distinguish this case from cited opinions of this Court which involved "affirmative judicial action such as ouster from possession of the block owner or granting a money judgment and execution."

In so ruling the Supreme Court of Missouri overlooked the nature of a declaratory judgment such as here involved.

In the case of *Mayor, Councilmen, etc.* v. *Dealers Transport Co.*, Mo. Sup., 343 S.W. 2d 40, the Court said: (l.c. 43)

> "[3] Under the Declaratory Judgment Act, the relief should be complete. As said in 26 C.J.S. Declaratory Judgments § 161, p. 374, 'As a general rule, in awarding declaratory relief, the court should make

a full and complete declaration, disposing of all questions of right, status, or other legal relations encountered in adjudicating the controversy, * * *.'"

In the case of *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, this court said: (l.c. 842)

"In the Civil Rights Cases, 1883, 109 U.S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L.Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'state authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion."

In the case of *Evans* v. *Abney*, 396 U.S. 435, 443, 90 S. Ct. 628, this Court said: (l.c. 633)

"No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated. Presbyterian Church in United States v. Hull Church, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)."

In the case of *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 549, 92 S. Ct. 1113, 1120, footnote 16, this Court said:

"In *Price, supra*, we said that '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the scope that its language and origins require. *Id.*, at 801, 86 S. Ct., at 1160."

D. The Supreme Court of Missouri Misconstrued the Facts and Misapplied the Law by Adopting and Applying the Decision of This Court in the Case of Jackson v. Metropolitan Edison Company, 95 S. Ct. 449, As the Controlling Law in This Case.

In *Jackson* v. *Metropolitan Edison Company,* 95 S. Ct. 449 (1974), where this court decided there was not adequate "State Action" to bring the matter under the Fourteenth Amendment in a suit brought by a customer against a privately owned and operated, state regulated utility corporation for damages under the Civil Rights Act for termination of service because of alleged delinquency in payments due for service, this Court cautioned: (l.c. 457)

> "* * * 'while a multitude of relationships might appear to come to fall within the Amendment's embrace, differences in circumstances beget differences in law, * * *.'"

The Missouri Court disregarded such caution in this case. In that case petitioner was not a "customer" defined as "any person lawfully receiving service from the Company" and was not covered by the contract. (l.c. 460) Referring to the *Pollak* and *Moose Lodge No. 107* cases, this court said: (l.c. 454)

> "In each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here."

In this case the Attorney General, all the public hospitals in Jackson County, Missouri, and the heirs and unknown heirs were necessary parties to this litigation, were made parties defendant by the plaintiff trustee, and were directly involved in the litigation. In that case Metropoli-

tan filed with the Public Utilities Commission a general tariff, a provision of which states Metropolitan's right to terminate service for non-payment.

The provision became effective 60 days after filing when not disapproved by the Commission.

This Court said: (l.c. 456)

> "As a threshold matter, it is less than clear under state law that Metropolitan was even required to file this provision as a part of its tariff or that the Commission would have had the power to disapprove it. The District Court observed that the sole connection of the commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it."

Contrast that with the full blown trial and judgments of the Missouri State trial court, the proceedings in its Supreme Court and the judgments rendered herein.

This Court, in discussing the *Pollak* case, said: (l.c. 456)

> "Here, on the other hand there was no such *imprimatur* placed on the practice of Metropolitan about which petitioner complains."

Such defect is not present in this case. Certainly, the publication of the opinion of the Supreme Court of Missouri in this case supplies the supreme "*imprimatur*" of the State of Missouri on the practices authorized by that opinion.

Comparison of the *Jackson* case and this case demonstrates the many important factual and legal differences totally disqualifying it as a controlling influence in this case, and discredits the Opinion of the Supreme Court of Missouri as being without substantial foundation.

CONCLUSION

For the foregoing reasons, in view of the uncontradicted documentary evidence in this record clearly establishing racial and religious discrimination in violation of the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. 1983, and irreconcilable conflict with controlling opinions of this Court in *Shelley* v. *Kraemer*, 334 U.S. 144, 68 S. Ct. 842, 92 L. Ed. 1161; *Evans* v. *Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373; and *Evans* v. *Abney*, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634, holding otherwise under similar circumstances, petitioners respectfully pray that this Court reverse the judgment in this case outright, finding the trust as null and void *per se*, and enter the final judgment of this court, reversing the judgment below and ordering the trust fund restored to the estate of Homer McWilliams, deceased, or in the alternative, if that may not be done, that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

No. 58,488

THE FIRST NATIONAL BANK OF KANSAS CITY,
Plaintiff-Respondent,

vs.

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI,
Defendant-Appellant,

and

LAKESIDE HOSPITAL ASSOCIATION, JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY, RESEARCH HOSPITAL AND MEDICAL CENTER, KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE, NORTHEAST OSTEOPATHIC HOSPITAL, SISTERS OF SAINT MARY (owning and operating St. Mary's Hospital), KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER, AND CHILDREN'S MERCY HOSPITAL,
Defendants-Appellants,

and

MARTIN LUTHER KING JR. MEMORIAL HOSPITAL,
Appellant,

and

MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CARLY (CAREY) McWILLIAMS, and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of Homer McWilliams, deceased,
Defendants-Appellants,

and

ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI, KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION, BAPTIST MEMORIAL HOSPITAL and INDEPENDENCE SANITARIUM AND HOSPITAL,

Defendants-Respondents.

Appeal from the Circuit Court of Jackson County
The Honorable James C. Moore, Judge

(Filed January 13, 1975)

Appeal from declaratory judgment in construction of and upholding a public charitable trust which purports to discriminate among its beneficiaries by race, religion, and national origin. Among the questions is whether the construction involves the State of Missouri and requires the exercise of its powers as to subject the trust to requirements of the United States Constitution, Amendments I and XIV, and Missouri Constitution, Article 1, Sections 2, 5, 7, and 10.

Also involved is an appeal by the Attorney General from a judgment awarding attorneys' fees, said judgment being designated as a separate final judgment for purposes of appeal. Rule 81.06, V.A.M.R.

Homer McWilliams, a bachelor, died testate December 21, 1965, aged 98 years. He was hospitalized in Trinity Lutheran Hospital continuously for the last 18 years of his life. Excluding several irrelevant minor bequests to cousins and friends, his Last Will and Testament, executed November 16, 1934, as modified by its First Codicil, executed March 20, 1946, provided that the bulk of his estate was to be held in trust for certain charitable purposes. The net value of the trust as of December 21, 1965, was $8,485,891.22.[1]

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1. As of January 17, 1974, the value of the trust had increased to $11,392,703.00.

Article XV of the will and codicil devised the remainder of testator's property to his trustees; established the "McWilliams Memorial Hospital Trust"; and directed "that the net income from the Trust Estate * * * be used annually by the Trustees * * * in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a non-profit basis in * * * Jackson County, Missouri, * * * and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. * * * And I give my said Trustees * * * full power and authority to select, and to give these benefits of this Trust, and to make such distributions to, said Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of the Trustees, * * * as they * * * shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid."

On May 21, 1969, the First National Bank of Kansas City, as sole surviving trustee, filed a petition which it amended June 18, 1970, "to construe a private and a public charitable trust." The amended petition was in six counts, and named as defendants the Attorney General of Missouri, all twenty-three licensed hospitals believed by plaintiff to be located in Jackson County, and the known and unknown heirs of Homer McWilliams.

In Count V of the petition, the only count relevant to this appeal, plaintiff alleges that it "is unable to ascertain with certainty the meaning of said words (Article XV of the Will) and cannot determine with certainty which hospitals in Jackson County, Missouri, and which patients therein, qualify as possible beneficiaries of the trust."

The petition was separately answered by Mary Elizabeth Blethroade Sutt, Elizabeth May Jackson, (Carey) Carly McWilliams, and Casley McWilliams, each claiming to be collateral heirs of Homer McWilliams; asserting illegality of the trust provisions and that Mr. McWilliams had no general charitable intent; that therefore the trust failed and they were entitled to the *res* as lawful heirs of the testator. The unknown heirs through their appointed attorney took a similar position.

The defendant hospitals who are now appellants (Lakeside Group) separately answered, each asserting that it qualified as a beneficiary of the trust; that compliance with the trust provisions would be discriminatory, illegal, and impossible; and that since testator expressed a general charitable intent, the *cy pres* doctrine should be applied to qualify all nonprofit nongovernmental hospitals in Jackson County and all indigent patients therein as beneficiaries.

The defendant hospitals who are now respondents (St. Luke's Group) separately answered, each alleging that it was a Protestant Christian hospital, operated on a nonprofit basis in Jackson County, caring for sick and infirm patients of all races, colors, creeds, and nationalities, and providing hospital service to deserving poor and unfortunate people; that therefore it qualified as a beneficiary and that the class of patients for which hospital care and services are provided by it, qualifies as a beneficiary under the Trust.

Each of the eight hospitals in the Lakeside Group are tax exempt, nonprofit corporations in Jackson County, Missouri; and licensed under the Missouri Hospital Licensing Law. All have been incorporated by pro forma decree or under the Missouri Not-For-Profit Act. None has any affiliation or connection with any organized church except

St. Mary's Hospital which is operated by the Sisters of St. Mary, a Roman Catholic Order. All admit substantial numbers of charity patients, and none discriminates among its patients, employees, or medical or administrative staff on the basis of race or religion. All are qualified to and do receive governmental Medicare and Medicaid payments, as well as federal funds under Hill-Burton, Federal Manpower, or other Acts.

Each of the four hospitals in St. Luke's Group is also located in Jackson County and is organized and operated in the same manner as the hospitals in the Lakeside Group, except that federal funds received by Baptist Memorial Hospital have been limited to Medicare and Medicaid, and except that each has a special relationship with and is controlled in part by a Protestant Christian Church.

Dr. Robert K. Ordway, President and Dean of the Missouri School of Religion in Columbia, Missouri, expressed opinions in definition of "Protestant" and "Christian." " 'Christian' is a term which applies to a body of religious belief and thought and doctrine in which the person, the ministry of Jesus Christ is of paramount importance." Dr. Ordway ascribed two meanings to "Protestant." "The generally accepted understanding of the term 'Protestant' " meant "any Christian religious group which is not either Roman Catholic or Orthodox." In his second and more technical definition, "* * * a 'Protestant,' to speak of a person, is a person who is a member of one of the religious bodies which is able to trace its historical heritage in general to the time of the Reformation, the 15th, 16th [and 17th] centuries, and including specifically the historical perspective that this group originated in some form of protest or an attempt to reform the Roman Catholic Church at that time."

Pursuant to these definitions, Dr. Ordway stated that there were various organizations in Missouri and in the United States which are generally known as Protestant Christian bodies, but which are not organized churches in themselves. Such bodies offer a wide range of social services including homes for children and aged, and schools and hospitals. In order to define such a nonchurch Protestant Christian institution, Dr. Ordway stated, "[t]he basic criteria would be that there is some definable formally accepted relationship which involves either expressed or implied control of that institution by the religious body." This relationship of control also involves "accountability" to the religious body. Without some formally accepted relationship, accepted by both the hospital and the Protestant denomination, such hospital would not qualify as a Protestant Christian Hospital.

In Dr. Ordway's opinion, the Baptist, Lutheran, and Episcopal churches are "Protestant Christian" churches under both his general and technical definitions; and based upon pertinent provisions of their charters and operations to be more fully stated below, their hospitals, Baptist Memorial, Trinity Lutheran, and St. Luke's, would qualify as Protestant Christian Hospitals. The Reorganized Church of Jesus Christ of Latter Day Saints and its hospital were "Protestant Christian" under his general definition; he was unsure whether they qualified under his technical definition.

Dr. Carl Oliver Bangs, a professor of historical theology at St. Paul's School of Theology in Kansas City, agreed with Dr. Ordway that "Protestant" in its general and common sense meaning was any Christian religious group which is neither Roman Catholic nor Orthodox. In his opinion, the Reorganized Church of Jesus Christ of Latter Day Saints can trace its heritage to the Protestant

Christian Reformation, and it and its Independence Sanitarium and Hospital are Protestant Christian entities.

Baptist Memorial Hospital was organized by a group of local Kansas City citizens of the Baptist faith, working primarily through local Baptist churches. The idea and concept of the hospital, although local in origin, evolved into part of the State Baptist Church Organization in Missouri. Its operation is directly controlled and accountable to the annual meeting of the Missouri Baptist Convention. Its purpose "is to found and maintain in Kansas City, Missouri, a hospital, of the highest standards * * * wherein to care for the sick and the afflicted in body and to administer to the bodily needs and to provide loving attention and nursing and service of skilled physicians and surgeons for restoration of such person to health and strength. And therein and thereby do deeds of benevolence of Christian charity to the sick and afflicted in which connection and as incident to the care and treatment of the sick and afflicted, to administer in the name of Christ to their spiritual needs and to the advancement of their spiritual welfare." The hospital must be affiliated with and subject to the Executive Board of the Missouri Baptist Convention. It must be governed by a board of trustees of thirty persons, at least 75 per cent of whom must be Baptists. The hospital cares for both charity and pay patients.

Independence Sanitarium and Hospital must "be operated as a non-profit, non-sectarian institution according to the statutes of this state and patients shall be received and treated without regard to nationality, religion, social or financial position." It is accountable to the Reorganized Church of Jesus Christ of Latter Day Saints with international headquarters in Independence. Its original incorporation was sponsored by the Reorganized Church of Jesus

Christ of Latter Day Saints. Among its aims and objectives is "to be guided by Christian principles, as understood by a sponsoring church—the Reorganized Church of Jesus Christ of Latter Day Saints—in all of its patient care and educational activities. Its policies are established in accordance with the principles of the Reorganized Church of Jesus Christ of Latter Day Saints which has a full measure of control over the appointment of the hospital's governing board. The Board of Trustees is responsible to the Reorganized Church of Jesus Christ of Latter Day Saints. Of the 9-member board, three are members of the Presidency of the Reorganized Church of Jesus Christ of Latter Day Saints and three are members of the Presiding Bishopric of the Church, the six highest spiritual and temporal leaders of the Church. At least six full-time administrators must also be ministers of the Church. The Reorganized Church of Jesus Christ of Latter Day Saints provides financial support for the hospital building fund and for indigent patients. If dissolved, the hospital's assets must be transferred to the Bishop of the Reorganized Church of Jesus Christ of Latter Day Saints.

Trinity Lutheran Hospital is owned and operated by Kansas City Lutheran Home and Hospital Association. Kansas City Lutheran is operated under the control and auspices of the Central States Synod of the Lutheran Church of America. A majority of the board of directors and the chief administrator of the hospital must be communicant members of the Lutheran Church of America. The chief administrator must report the hospital's operation annually to the annual convention of the Central States Synod. In the event of dissolution of Kansas City Lutheran, its property and funds are to be distributed to the West Central Conference of the Augustana Evangelical Lutheran Church or its successor, the Central States Synod, or its successor. The Lutheran Church of America is not

a part of the Roman Catholic Church, the Old Catholic Church, or the Western Church, and does not recognize the Pope as its spiritual or administrative head.

St. Luke's Hospital is affiliated with the Protestant Episcopal Church in the United States of America, and particularly with the Diocese of West Missouri. All members of its board of directors are members of the Protestant Episcopal Church in the United States of America. The Bishop of the Diocese of West Missouri is the chairman of the board of directors.

The court, pursuant to findings of fact and conclusions of law, ordered, adjudged and decreed:

"That the words 'Protestant Christian Hospital' as used in the Last Will and Testament of Homer McWilliams and the First Codicil thereto are construed to mean those hospitals that have some special relationship to and at least partial control by a Protestant Christian church.

"That the words 'Protestant Christian' as used in said Will and Codicil thereto are not indefinite, and the class of hospitals intended can be determined.

"That the selection of beneficiaries of the trust according to the provisions of said Will and Codicil thereto will not result in unlawful discrimination based on race or religion and is lawful.

"That the Baptist Memorial Hospital, the Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all qualify as proper beneficiaries under the Will of Homer McWilliams and the First Codicil thereto, and none of the other defendant hospitals do so qualify."

Appellant hospitals, the Lakeside Group, joined by appellant Martin Luther King, Jr. Memorial Hospital, contend the court erred:

I. In ruling respondent hospitals to be "Protestant Christian," because (1) the phrase "Protestant Christian" is so vague and uncertain that its meaning and effect cannot be defined or determined, and (2) even if its meaning can be determined there are no "Protestant Christian" hospitals in Jackson County and, as a consequence, "Protestant Christian" should be stricken from the trust;

II and V. In enforcing the trust's "racial and religious restrictions" for the reason such judicial action violates the United States Constitution, Amendments I and XIV, and Missouri Constitution, Article 1, Sections 2, 5, 7, and 10, by implicating the State of Missouri in unlawful discrimination;

III. In enforcing the trust's "discriminatory" provisions when it is so related to an inherently public aspect of community life as to be governed by the proscription of the United States Constitution, Amendment XIV, as demonstrated by (A) the public charitable nature of the trust; (B) the public nature of the beneficiaries and the functions they serve, and (C) the quasi-public nature of the trustee, a national banking agency and instrumentality of the federal government;

IV. In qualifying respondent hospitals and in refusing to qualify appellant hospitals as trust beneficiaries based on religious doctrine forbidden by United States Constitution, Amendments I and XIV;

VI. In refusing to apply the doctrine of *cy pres* so as to strike the trust's "unlawful racial and religious restrictions, for the reason that the trust * * * exhibits a general charitable intent to benefit all non-profit, non-governmental hospitals in Jackson County, Missouri, and all patients therein."

Appellants known and unknown heirs of the testator assert:

I. Certain "basic legal requirements of a valid public charitable trust, viz., (A) it must conform to existing law to be valid; (B) testator's expressed and unambiguous intent governs unless contrary to law; (C) the main object and purpose of the charity cannot be changed; (D) a purported trust void on its face or illegal or impossible of performance is a nullity; (E) where the heirs of the donor no longer have any lawful interest in the trust assets, courts have greater freedom in determining the proper use of such funds, to concede:

II. The dominant specific and limited charitable purpose of testator was to create a public charitable trust to secure "the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid," to wit, "Sick and infirm patients in said hospitals (Protestant Christian Hospitals) born of white parents in the United States of America"; but to assert the court erred:

III. In entering a judgment which placed the State in a position of sponsoring and promoting racial and religious discrimination and making it the duty of the trustee and state officers to enforce the trust in direct violation of constitutional provisions;

IV. In ruling that its construction of the trust would not result in unlawful discrimination based on race;

V. In its construction because it advances religion in a partisan way by giving aid and encouragement to "one Christian Protestant Religion" to the exclusion of all other religions; all to conclude:

VI. That the intent of this trust was to aid a special kind of charity in violation of constitutional provisions,

rendering the instrument illegal and void, thereby foreclosing resort to any auxiliary rules of construction such as *cy pres* or deviation, all to conclude that the purported trust failed leaving the trust *res* to pass to the testator's heirs.

Appellant Attorney General contends the court erred:

I. In determining that the trust will not result in unlawful discrimination based on race for the reason that under the "sifting facts and circumstances test," Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), there exists the requisite state action, in that the creation, administration, and enforcement of the charitable trust, necessitates involvement of the State through its statutes, elected officials and courts, and requires the exercise of powers possessed by the State, thereby subjecting any action thereunder to the constitutional guarantee of equal protection of law under the United States Constitution, Amendment XIV, and therefore any racial limitation should be declared null and void and stricken from the trust, by virtue of testator's general charitable intent.

Under II, the Attorney General is neutral on the declaration that certain hospitals, the St. Luke's Group, are Protestant Christian Hospitals, but asserts jurisdiction in the court to determine if the phrase "Protestant Christian Hospitals" is vague and unenforceable without infringing on constitutional provisions for the reason that the subject of controversy is a will which establishes a charitable trust, in order to contend the court erred:

III. In failing to apply the doctrine of deviation or of *cy pres* to benefit all defendant hospitals.

Appellant Attorney General contends also, with respect to the judgment awarding plaintiff's attorneys' fees,

that the court erred in the fee allowed to plaintiff's attorneys asserting it was excessive and unreasonable.

The problem here is the construction of the quoted provisions of Article XV of the will of Mr. McWilliams; and there are many cases replete with the familiar rules governing resolution of construction problems.

The object is to ascertain the testator's intention. If the intention is plain and unambiguous, such intention must govern, provided it is not contrary to law. If the will contains plain and unambiguous language, courts give effect thereto, and have no authority to do otherwise on the ground that provisions of the instrument are not in harmony with the trend of the times. First National Bank of Kansas City v. Waldron, 406 S.W. 2d 56, 58, 59 (Mo. 1966). The function of the court is to construe the will as written by the testator and not to make or rewrite one for the testator under the guise of construction. Burrier v. Jones, 338 Mo. 679, 92 S.W. 2d 885, 887[1] (banc 1936). The testator is presumed to know and intend the legal effect of the language he employs in his will, First National Bank of Kansas City v. Hyde, 363 S.W. 2d 647, 653[8] (Mo. 1962); the courts give his words their plain and ordinary meaning, Cox v. Jones, 229 Mo. 53, 129 S.W. 495, 498 (1910), and take judicial notice of those meanings, City of St. Charles ex rel. Palmer v. Schulte, 305 Mo. 124, 264 S.W. 654, 655[2] (1924). Where a charitable trust is in issue, it is considered that charitable gifts and trusts are favorites of the law and will be construed as valid when possible by applying the most liberal rules of which the nature of the case admits, and are often upheld where a private trust would fail. Burrier v. Jones, supra, 92 S.W. 2d l.c. 887[7]; Ervin v. Davis, 355 Mo. 951, 199 S.W. 2d 366, 368[2] (1947).

It is not questioned that the will of Mr. McWilliams created a charitable trust. Suffice to say that his trust meets the definition of a charitable trust in Restatement of Trusts 2d, Section 348, page 210, viz., "* * * a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." With respect to the charitable purposes of Mr. McWilliams, see Taylor v. Baldwin, 362 Mo. 1224, 247 S.W. 2d 741, 749]2] (banc 1952), and see, generally, Voelker v. St. Louis Mercantile Library Ass'n, 359 S.W. 2d 689, 693-694[4] (Mo. 1962); Buchanan v. Kennard, 234 Mo. 117, 136 S.W. 415, 421-422[8, 9] (Mo. 1911).

There are two identifiable classes of beneficiaries designated by Mr. McWilliams to which his trustee, in its discretion, is empowered to distribute the income from his trust estate. First is the class of nonprofit Protestant Christian Hospitals located in Jackson County, Missouri; second is the class of sick and infirm patients in said hospitals, born of white parents in the United States of America.

The designation of the first class is unambiguous and is determinable irrespective of the expert testimony of Dr. Ordway and Dr. Bangs which is consistent with and supports such determination.

In Conway v. Third Nat. Bank & Trust Co. of Camden, 177 A. 113 (N.J. 1935), the trust was asserted to be indefinite, uncertain, and impossible of execution where the testator directed his trustees to select as his beneficiaries children with Christian antecedents. The court in upholding the designation of such a class, said, "It is hardly necessary to say that a Christian is one who believes or professes or is assumed to believe in Jesus Christ and

the truth as taught by Him * * *." 177 A. l.c. 116. Black's Law Dictionary, Rev. 4th Ed. (1968), defines "Christian" as "pertaining to Jesus Christ or the religion founded by him; professing Christianity. As a noun it signifies one who accepts and professes to live by the doctrines and principles of the Christian religion; it does not include Mohammedans, Jews, pagans, or infidels * * *." See also 76 C.J.S. 736, Religious Societies, § 1.

76 C.J.S., Supra, page 741, defines "Protestant" as "A Christian who protests against the doctrines and practices of the Roman Catholic Church; a general term comprehending all those who, professing Christianity yet are not in the communion of the church of Rome; a collective name for a large class of Christian denominations, and embracing all such denominations, except the Roman Catholic and Eastern Churches." Black, supra, defines "Protestants" as "Those who adhered to the doctrine of Luther; so called because, in 1529, they protested against a decree of the emperor Charles V. and of the diet of Spires, and declared that they appealed to a general council. The name is now applied indiscriminately to all the sects, of whatever denomination, who have seceded from the Church of Rome." See also Nicholas v. Evangelical Deaconess Home and Hospital, 281 Mo. 182, 219 S.W. 643, 646 (1920).

In short, "Protestant Christian" is not ambiguous. Both terms have an ascertainable meaning; and in common and familiar usage denote a non-Catholic Christian religious body. When the non-Catholic Protestant Christian entity is a hospital, as in the McWilliams trust, it reasonably means, as found by the trial court and applied to St. Lukes, Trinity Lutheran, Baptist Memorial, and Independence Hospitals, a hospital that has some relationship to and control by a Protestant Christian Church, and when

such bodies are selected in the trustee's discretion, such class becomes fixed and definite. Epperly v. Mercantile Trust & S. Bank of Quincy, Ill., 415 S.W. 2d 819, 821, 822 (Mo. 1967); Yeager v. Johns, 484 S.W. 2d 211 (Mo. 1972).

It has been recognized in several instances that secular institutions such as colleges and hospitals are properly operated under the "control," "auspices," or "management" of religious entities. See, e.g., In re Estate of Hall, 193 S. 2d 587 (Miss. 1967); State ex rel. Morris v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S.W. 990 (1903); State ex rel. Waller v. Trustees of William Jewell College, 234 Mo. 299, 136 S.W. 397 (1911); Farm & Home Savings & Loan Ass'n v. Armstrong, 337 Mo. 349, 85 S.W. 2d 461 (banc 1935); Bradfield v. Roberts, 175 U.S. 291 (1899); Speer v. Colbert, 200 U.S. 130 (1906). In such instances, the institutions may be creatures of the governments under which they are organized, yet they are commonly recognized and held out to be "sectarian" institutions with emphasis on the particular sect involved.

The argument of appellant hospitals, the Lakeside group, that in order to classify a hospital as "Protestant Christian" it must be one organized by Protestant Christians, operated by Protestant Christians for the sole and exclusive benefit of Protestant Christians, begs the true question under the foregoing authorities and under the evidence in this case that the four respondent hospitals, the St. Lukes group, are Protestant Christian hospitals serving and offering facilities to the public, sectarians and nonsectarians, and patients of all descriptions alike.

It should be noted also that the court's finding in this respect does not preclude hospitals other than the respondent St. Lukes group from qualifying as beneficiaries of this trust in the future upon a showing they are Prot-

estant Christian hospitals operated on a nonprofit basis in Jackson County. None of the other hospital defendants make any claim that it has any relationship to or control by a Protestant Christian church. Each of them claims only that the limitation of beneficiaries to "Protestant Christian hospitals" is illegal and should be stricken.

The designation of the second group of beneficiaries is also unambiguous and determinable.

The bequest for the benefit of "sick and infirm patients" in specific hospitals is sufficiently definite for a charitable trust. Buchanan v. Kennard, supra. The same is true of the designation "born of white parents in the United States of America." See e.g., Olivas v. The Board of National Missions of Presbyterian Church, 405 P. 2d 481 (Ariz. 1965), sustaining a trust "for homesite for Yaqui Indians"; In re Estate of Hall, supra, clarified 195 S. 2d 94, modified 197 S. 2d 235, sustaining a trust to "Christian (church school—any denomination but prefer a Methodist College) education of poor boys and girls as long as world stands"; Allaun v. First & Merchants Nat. Bank of Richmond, 56 S.E.2d 83 (Va. 1949), recognizing validity of a trust for the "white poor of Powhatan County"; Bronson v. Strouse, 17 A. 699 (Conn. 1889), upholding validity of a trust to pay interest to a "poor, deserving, Jewish family residing in the city of New Haven"; Beardsley v. Selectmen of Bridgeport, 3 A. 557 (Conn. 1886), validating a trust "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut."

Appellants' charge that administration of this trust as now construed will result in both religious and racial discrimination in violation of United States Constitution, Amendments I and XIV, stems from the statement in 25 A.L.R. 3rd 736, 739 (1969):

"Under the more recent United States Supreme Court decisions, a charitable gift which is of such a nature that it will tend to carry out a function normally regarded as public in nature, or will require for its administration some governmental act, either in the way of enabling legislation or necessary governmental administration, will constitute a violation of the rights afforded by the Fourteenth Amendment * * * if the beneficiaries thereof are limited or defined in terms including the race or religion of an otherwise eligible beneficiary.

"In those cases where a gift of this nature is not enforced pursuant to the exclusion under consideration, either because the gift is held void under general considerations, as being too uncertain in its selection of beneficiaries or as involving proscribed state action, or because of the refusal of the trustee to take the gift under the conditions imposed, the courts have evidenced a desire to effect the general purposes of the gift by deleting the racial or religious exclusion, rather than to hold the gift void in its entirety,[2] although in a few cases this type of gift has been held to revert to the grantor or his heirs."[3]

Appellants suggest that where forbidden invidious discrimination exists in a charitable trust, four theories have been advanced in the search for existence of "proscribed state action" which renders null and void a discriminatory provision in the trust instrument. These are characterized as the "public arena" theory found in Evans v. Newton, 382 U.S. 296 (1966); the "state function" theory employed in the so-called "white primary cases," e.g., Nixon v. Herndon, 273 U.S. 536 (1927); the "state property" theory,

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2. The position taken by appellants Lakeside group and Attorney General seeking application of *cy pres* or deviation.

3. The position taken by appellants known and unknown heirs seeking reversion of the trust *res*.

e.g., Hampton v. City of Jacksonville, 304 F. 2d 320 (5th Cir. 1962); and the "sifting facts and weighing circumstances" theory of Burton v. Wilmington Parking Authority, supra. See also the Girard Trust cases, particularly Commonwealth of Pennsylvania v. Brown, 392 F. 2d 120 (3rd Cir. 1968); Shelley v. Kraemer, 334 U.S. 1 (1968); Barrows v. Jackson, 346 U.S. 249 (1953); Bank of Delaware v. Buckson, 255 A. 2d 710 (Del. 1969); Milford Trust Co. v. Stabler, 301 A. 2d 534 (Del. 1973); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (1963); Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964); Connecticut Bank & T. Co. v. Johnson Memorial Hospital, 294 A. 2d 586 (Conn. 1972), involving discrimination based upon race. Similar cases involve discrimination based upon religion, e.g., Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); State v. Madison, 213 A. 2d 880 (Md. 1965).

Appellants pose two questions to be answered in determining whether this trust contains restrictions which violate the Fourteenth Amendment: (1) Are its restrictions discriminatory? (2) If so, are they so purely private as to lie outside the scope of the Fourteenth Amendment?

On question (1), appellants assert that the trust's racial and religious discriminations are *per se* and under all circumstances discriminatory. They argue that state action is involved in the administration of this trust, asserting variously that: "Judicial action enforcing the trust's discriminatory provisions is 'state action'" under the cases, particularly the Civil Rights cases, Shelley v. Kraemer, Barrows v. Jackson, Evans v. Newton, Bank of Delaware v. Buckson, Milford Trust Co. v. Stabler, supra, and Hawaiian Trust Co. v. Caffaro, No. 26496, Circuit Court of the First Circuit of Hawaii (unpublished opinion); that the statutory right to make a will and to create a trust,

the right to give it perpetual existence, to have it construed, to have a trustee and accounting, the right to tax benefits, and the public nature of the trust, show the requisite "state action" to strike the discriminatory restrictions of the trust under the "sifting facts and weighing circumstances test" of Burton v. Wilmington Parking Authority, supra, and the performance of a "function of the state" as in Eaton V. Grubbs and Evans v. Newton, supra; that, absent these factors, the Fourteenth Amendment would be violated by administration of this trust due to the public charitable nature of the trust itself, the public function fulfilled by the hospital beneficiaries under Simkins v. Moses H. Cone Memorial Hospital, supra, and the public functions served by the trustee, a national banking association.

On question (1) respondents concede that racial discrimination will result from selection of only white patients as one class of beneficiaries of this trust; however, it is at most arguable whether racial discrimination will result *per se* from selection of only "Protestant Christian hospitals" as the other class of beneficiaries of this trust. See Bradfield v. Roberts, supra; Speer v. Colbert, supra; State ex rel. Morris v. Board of Trustees of Westminster College, supra; Wyatt v. Stillman Institute, 303 Mo. 94, 260 S.W. 73 (1923); Society of Helpers of Holy Souls v. Law, 267 Mo. 666, 186 S.W. 718 (1916).

On question (2), even if it be assumed that racial discrimination or religious discrimination, or both, be present, such discrimination in the administration of this trust is not illegal under the Fourteenth Amendment because "state action" is not involved.

The Fourteenth Amendment provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also Missouri Constitution, Article 1, Sections 2, 5, 7, and 10. Appellants recognize, as they must, that this amendment does not prohibit racial and religious discrimination in private transactions unless "state action" is involved. "The Civil Rights cases * * * 'embedded in our constitutional law' the principle 'that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment exerts no shield against merely private conduct, however discriminatory or wrongful.' * * * Shelley v. Kraemer * * *. It was language in the opinion in the Civil Rights Cases * * * that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequences upon 'State action of every kind . . . which denies . . . the equal protection of the laws.' * * * some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.' Cooper v. Aaron, 358 U.S. 1, 4 (1958). It is clear, as it always has been since the Civil Rights Cases * * * that 'Individual invasion of individual rights is not the subject-matter of the amendment,' * * * and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, supra, 365 U.S. l.c. 721-722. Note also that in Evans v. Newton, supra, it was only because state action was required to carry out the terms of the will in question that its discriminatory pro-

visions could not be enforced. Absent such required state action, such discrimination would not be illegal because "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State, * * * *arguendo* * * * no constitutional difficulty would be encountered." 382 U.S. l.c. 300.

Under the facts of this case, "state action" was not involved in the creation of the trust, nor is it required to carry out its term. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion. Nothing in the will limits the use of funds given to "Protestant Christian hospitals"; nothing prohibits or prevents such hospitals from using the money for any purpose within the purview of their charters, including rendering services and offering facilities without regard to race, religion or national origin, and they do perform these functions without discrimination. Once the trustee has exercised its discretion as to which of the Protestant Christian hospitals provides the greatest measure of services to the poor and deserving of the class described and distributions are made to such hospitals, no provision of the will restricts the use of the funds by the hospitals. Similarly, the trustee has the discretion to select deserving individuals of the class of "sick and infirm patients in said hospitals born of white parents in the United States * * *." No public body is involved in the latter selection because payments to any such beneficiaries would flow directly from the trustee to them.

Such circumstances in this case distinguish this case from those in which the trustee is a governmental body. See e.g., Evans v. Newton, supra; Evans v. Abney, 396 U.S. 435 (1970).

Nor has the court in construing this trust engaged in "sponsoring," "promoting," or "enforcing" discrimination, as in Shelley v. Kraemer, supra, and Barrows v. Jackson, supra, where the court was asked to rule the legality of a restrictive covenant prohibiting real estate sales to blacks, and to implement the holding by affirmative judicial action such as ouster from possession of the black owner or granting a money judgment and execution.

By way of contrast, the court was asked to determine only the hospitals intended by the testator to be identified. The court was not asked to direct the trustee nor to execute the trust, nor to choose beneficiaries. It was asked only to construe a trust provision to determine a testator's intent. Cf. Bank of Delaware v. Buckson and Milford Trust Co. v. Stabler, supra.

If appellants' arguments were sustained, then no transfer of property by will to a religious institution or to a person of a designated race could be valid if a construction of the will's provisions became necessary. Such is not an indicated result under the law. Evans v. Newton, supra. See also Moose Lodge No. 107 v. Irvin, 407 U.S. 163 (1972). See also discussion of "state action" as to bring into play the prohibition of the Fourteenth Amendment in Guillory v. Administrators of Tulane University, 212 F. Supp. 674, 683-687[6] (E.D. La. 1962), and In re Girard College Trusteeship, 138 A. 2d 844, 851-852 (Pa. 1958).

Neither is "state action" present simply because a public trust is involved. Voelker v. St. Louis Mercantile Library Ass'n, supra, 359 S.W. 2d l.c. 693-694; Buchanan v. Kennard, supra, 136 S.W. l.c. 421-422; nor is "state action" involved because of the public nature of the hospital beneficiaries and their regulation or partial funding by the government. Simkins v. Moses H. Cone Memorial

Hospital, supra; Ward v. St. Anthony Hospital, 476 F. 2d 671, 675 (10th Cir. 1973); Stanturf v. Sipes, 224 F. Supp. 883 (W.D. Mo. 1963), aff. 335 F. 2d 224 (8th Cir. 1964). Nor is the trustee bank engaging in significant encouragement of discrimination as to constitute a "state action." Kruger v. Wells Fargo Bank, 521 P. 2d 441 (Cal. banc 1974). If it were so, then no national bank could act as executor or trustee where the devise was to a church or to a racially determined person.

The last word on the subject of "state action" demonstrates the absence of "state action" in this case. Under Jackson v. Metropolitan Edison Co., ... U.S. ..... (1974), 43 L.W. 1097 (12/23/74), a utility's discontinuance of electric service for nonpayment of bills is not action under color of state law which must meet due process standards. The court observed that despite extensive and detailed state regulation of the utility, there is not a sufficiently close *nexus* between the state and the utility's act to require treatment as state action. The court concluded that neither the utility's monopoly status nor its performance of an important public service warranted holding otherwise, i.e., the State never directed nor authorized the challenged practice, and the court could not find the "symbiotic relationship" that warranted a state action finding in Burton v. Wilmington Parking Authority, supra.

Appellants charge also that the court's construction involves factors of religious doctrine and results in aid and encouragement to one Protestant Christian religion to the exclusion of all others.

Suffice to say that this decision does not spring from resolution of ecclesiastical or religious doctrinal issues. See Watson v. Jones, 80 U.S. 679 (1871); Presbyterian Church v. Hull Church, supra, 393 U.S. l.c. 451. The issue here resolved was what hospitals and persons Homer McWil-

liams intended to identify, and was not whether any of such hospitals was, in itself, a "Protestant Christian" entity. There was no contest over rights regulated by ecclesiastical law or religious doctrine; and there is no contention that any party to this suit has discriminated against any patient on account of his religion.

With the case in this posture, there is no room for application of *cy pres* or deviation and they need not be discussed. Neither is there any failure of the trust to cause the trust *res* to pass to testator's heirs.

There were twenty separate applications for attorneys' fees, supported by time and work sheets, oral testimony, and memoranda covering the criteria applicable to such allowances. Attorneys for appellant hospitals adduced expert testimony that a reasonable rate in Kansas City for services of the nature of those rendered by such attorneys was "at least" $50 per hour. Mr. Bush testified in support of his firm's application: that he was the senior member of his firm and had done about 95 per cent of his firm's work in this case, the remainder having been accomplished by his partner, Mr. Snapp; that he had no fee arrangement with the plaintiff trustee except his firm was to be paid a reasonable fee to be determined by the court, payable from the trust assets; that he had no way to receive a contingent fee as in the case of attorneys for the known heirs who, if successful, could receive several million dollars each in fees; that the court should consider all the criteria generally recognized as applicable to the problem of his fee, e.g., time and labor, novelty and difficulty of questions, the caliber of the attorneys representing his opposition, results obtained, amount involved both in dollars and responsibility, the one-time nature of the professional relationship, experience, reputation and ability of the lawyers performing services, whether the fee is fixed

or contingent; that he had been with this case more than five years, over four and a half of which were in court; that he had not collected any fee; that he had at least $30,000 in office overhead attributable to the case; that he and his partner had over 1600 hours invested in the case; that the court should fix the fee at no less than that authorized by Section 473.153, RSMo 1969, for fees for executors or administrators in probate estates; that there is a difference between attorneys for the hospital defendants; that he was the lead attorney and was involved in acute tax matters and in six counts of the suit, whereas attorneys for the other parties were involved only in Count V; that he fell heir to all the mechanical work necessary to keep the litigation moving; that had he not been successful, the entire trust might have failed and devolved to the heirs and none of the hospitals or indigents intended to benefit from the trust would have realized any such benefit.

All applications were granted as prayed except for the prayer of the attorneys for the trustee. The fees for attorneys representing defendant hospitals were allowed on the time-rate basis suggested by their expert. The court was unable to accept the request of plaintiff's attorneys for an allowance of $234,000 for fees and expenses to the extent it was based on a percentage formula in the Probate Code. The ultimate allowance of $176,000 to plaintiff's attorneys, although approximately one fourth less than that prayed, is the only allowance in question.

Factors to be considered as guides in determining the reasonableness of such allowance include:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood * * * that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the area for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent." Rule 4-DR, 2-106. See also American Bar Association Code of Ethics.

It is recognized also that an attorney for a trustee in a will construction suit is entitled to be paid the full value of his services, while attorneys for claimants to the estate are entitled to be paid only for the value of their services to the estate. Trautz v. Lemp, 334 Mo. 1085, 72 S.W. 2d 104 (1934); St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W. 2d 578 (1945); Lang v. Taussig, 194 S.W. 2d 743 (Mo. App. 1946).

In support of the judgment allowing attorneys' fees, and in particular of the allowance to plaintiff's attorneys, the trial court filed a memorandum opinion:

"This suit was commenced by the corporate trustee to obtain a construction of the trust provisions of the will. The Attorney General and all hospitals in Jackson County, Missouri, then licensed as such, were joined as defendants. By amendment two possible heirs at law of the testator

were impleaded, as well as the unknown heirs. The appointed attorney for the unknown heirs investigated other possible heirs, and two more intervened.

"Most of the parties have prayed the allowance of attorney's fees to be paid from the trust estate. Evidence has been adduced as to the particular services and their value and as to the ordinary and customary charge for such services. This Court must resolve the question of who is entitled to an allowance and the further question of what amount is reasonable and proper. * * *

"Those * * * who * * * seek allowances can be grouped in some instances. Before discussing them it is appropriate to make some comment.

"One of the cases cited is Mercantile Trust Company National Association v. Jaeger, 457 S.W. 2d 727 (Mo. en banc 1970). The holding in that case is of minimal value here, for the issue was whether attorney fees should be allowed to the trustees where the litigated issue was the proper compensation of the trustees themselves.

"The opinions are, however, valuable for other reasons. First, they collate and discuss the controlling precedents. Second, they illustrate how widely seven trained and experienced minds can honestly differ. *Mercantile, supra,* at 733-734, 736, 743-746.

"The other case is City of St. Louis v. McAllister, 257 S.W. 425 (Mo. en banc 1924) * * *. There the general rule is announced at length. Allowances were made to heirs who intervened.

"To return to the applicants here, the most readily handled defendants are those who prevailed. They succeeded in obtaining a construction * * * which upholds the trust without modification or resort to the doctrine of

cy pres. These are Trinity Lutheran Hospital, St. Luke's Hospital, Baptist Memorial and Independence Sanitarium.

"In general, the remaining hospital defendants did not seek the destruction of the trust but rather a construction of the trust provisions sufficiently broad so as to encompass them. Six of these, Lakeside, Jewish Memorial, Research, Kansas City College of Osteopathic Medicine, Northeast Osteopathic, and St. Mary's, aligned themselves together with a view toward minimizing duplication of work; * * *

"The eight mentioned together with Wheatley-Provident, Downtown, Plaza, St. Joseph, and Neurological hospitals participated actively in the trial * * * and made contributions. They do not have to be 'winners' to be allowed attorney fees from the trust estate. Trautz v. Lemp, 72 S.W. 2d 104, 107 (Mo. en banc 1934).

"There has never been any question as to the propriety of an allowance to the attorney for the unknown heirs. The unknowns were joined in the hope that a final adjudication could be made, one binding on all concerned.

"How does this affect the heirs at law who were joined as defendants or who intervened when they learned of the litigation? The attorney for the unknown heirs performed the role of devil's advocate. For this he is to be compensated. Are the individual heirs less deserving of allowances? The named defendants were not mere volunteers, nor were the intervenors who responded to the invitation when the unknown heirs were summoned.

"The Court is not unaware of the 'no benefit, no fee' rule. Nor is the Court unmindful that the individuals were actuated by self-interest and that their attorneys would have been handsomely rewarded had they been successful. * * *

"The propriety of allowances to the individuals is not free from doubt. Mercantile Trust Company National Association v. Jaeger, *supra* and especially Judge Seiler's discussion of St. Louis Union Trust Company v. Kaltenbach, 186 S.W. 2d 578, in his dissenting opinion, 457 S.W. 2d at 744-746.

"However, the nature of this case and the posture of the individual defendants caused them to contribute to the construction of the trust instrument and thereby a benefit to the trust estate. They should receive allowances.

"The amount of allowances should be governed by traditional considerations codified in Supreme Court Rule 4 and especially DR 2-106 of that rule. There is ample evidence in the record to enable the Court to take the listed factors into consideration as guides in determining the reasonableness of the fee allowances.

"No unusual problem is encountered until reaching the application of the trustee. The Court accepts the written application and supporting oral testimony of its counsel. The services have been outstanding, the problems complex. The amount involved is great, and the result obtained is that sought. The Court, however, is unable to accept a percentage formula derived from the Probate Code. Likes must be compared with likes, and there are too many differences between an allowance by the probate court in the administration of an estate and an allowance in an equity case such as the instant one. The factors have been balanced and a result reached considerably in excess of other allowances herein and considerably less than that prayed."

The foregoing memorandum has been quoted in near entirety because it demonstrates that the trial judge, the Honorable James C. Moore, appreciated the difficulties and

differences of opinion inherent in the task of setting attorneys' fees, considered the evidence on the issue in detail, and considered and made application of the appropriate legal standards and criteria to the evidence in resolving the issue.

Judge Moore has been a lawyer in Kansas City, Missouri, since 1934, and a judge of the Circuit Court of Jackson County, Missouri, since 1963. Official Manual State of Missouri 1973-1974. Judge Moore, more than any person, was in position to judge the relative value of all legal services rendered in this case and those rendered by the attorneys for the trustee in particular. The judgment may not be disturbed unless clearly erroneous. Scott v. Home Mutual Telephone Co., 510 S.W. 2d 793, 795 (Mo. App. 1974). Such a demonstration is absent in this case. As observed in Donaldson v. Allen, 213 Mo. 293, 111 S.W. 1128, 1129[1] (1908), "* * * the judge deciding the point presumptively knew the character of the services rendered in duration, zeal, and ability. He presumptively knew the value of them according to custom, place, and circumstance. * * * In this view of the matter, there is room for a most violent presumption that the trial court did not err in gauging the quantum of the fee." See also Sebree v. Rosen, 393 S.W. 2d 590 (Mo. 1965); Billinger v. Jost, 510 S.W. 2d 57, 58 [1, 2] (Mo. App. 1974).

Judgments on both the merits and in allowance of attorneys' fees affirmed.

Andrew Jackson Higgins, Commissioner

Welborn, C., concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court. All of the judges concur.

APPENDIX B

IN THE CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT
Division 9

No. 726,091

THE FIRST NATIONAL BANK OF KANSAS CITY,
A National Banking Association,
Plaintiff,

vs.

THE HONORABLE JOHN C. DANFORTH, Attorney General of Missouri, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Now on this day the Court again takes up this cause and having heretofore tried the issues raised in Count I of the First Amended Petition herein at a separate trial held pursuant to Rule 66.02 and having heretofore specifically designated its judgment entered at that trial on Count I to be a final judgment for the purposes of Appeal pursuant to the provisions of Rule 81.06, the Court now takes up the issues raised in Counts II to VI inclusive of said First Amended Petition and again, pursuant to the provisions of Rule 66.02, orders that a separate trial be held as to the issues raised in said Counts only and specifically reserves and retains jurisdiction to hear and determine, in a separate trial to be held later, the issues of whether or not any of the parties hereto or their attorneys are entitled to be allowed reasonable attorney's fees to be paid out of the trust estate and if so the amount thereof,

AND THE COURT, now having heard the evidence relating to the issues raised in Counts II to VI inclusive of said First Amended Petition, and having read and considered the briefs of counsel, and being fully informed in the premises, does hereby make the following findings of fact and conclusions of law and does hereby enter the following judgments:

Findings of Fact Common to All Counts

1. The Court makes the following findings of fact common to all counts in the petition:

(a) That this is an action to construe the Last Will and Testament, together with the First Codicil thereto, of Homer McWilliams, deceased, in which he created the McWilliams Memorial Hospital Trust, a public charitable trust.

(b) That plaintiff herein is a national banking association duly organized and existing according to law and is lawfully vested with authority to exercise trust powers.

(c) That defendant John C. Danforth is the duly elected and acting Attorney General of the State of Missouri, and in such capacity is the proper party to represent the citizens of Missouri in litigation involving the construction of a public charitable trust.

(d) That defendants Baptist Memorial Hospital, Downtown Hospital Foundation, Florence Crittenton Home, Kansas City General Hospital & Medical Center, Kansas City College of Osteopathy and Surgery, Lakeside Hospital Association, Plaza Hospital, Inc., Research Hospital and Medical Center, St. Joseph's Hospital, St. Luke's Hospital of Kansas City, Missouri, The Willows Maternity Sanitarium, Inc., Independence Sanitarium and Hospital, Kansas City Lutheran Home and Hospital Association,

Western Missouri Mental Health Center, The Children's Mercy Hospital, Doctors' Osteopathic Hospital, Jackson County Public Hospital, Jewish Memorial Hospital Association of Kansas City, Northeast Osteopathic Hospital, Neurological Hospital Association, Sisters of Saint Mary, Veterans' Administration Hospital, and Wheatley-Provident Hospital constitute all of the licensed hospitals located in Jackson County, Missouri, known to plaintiff, and are named as defendants as possible beneficiaries of the trust.

(e) That defendants Elizabeth May Jackson, Mary E. Blethroade, Casley McWilliams and Carey McWilliams are the only known heirs-at-law of Homer McWilliams, deceased; that there may be unknown and unborn heirs-at-law of Homer McWilliams, deceased, and that Jesse L. Childers, an attorney at law duly admitted to practice before this Court, has heretofore been appointed as attorney for such unknown and unborn heirs and has duly represented them.

(f) That Homer McWilliams died on December 21, 1965, and his Last Will and Testament, together with a First Codicil thereto, was duly admitted to probate in the Probate Court of Jackson County, Missouri, as Estate No. 99,800; that a copy of said Last Will and Testament of Homer McWilliams, and the First Codicil thereto, is attached to the petition herein, marked "Exhibit A," and has been duly admitted in evidence.

(g) That under the provisions of Article XV of said Last Will and Testament as modified by the First Codicil thereto, the said Homer McWilliams established the McWilliams Memorial Hospital Trust, a public charitable trust, for the purpose of providing maintenance and support for certain charitable hospitals and needy persons, all as more fully set out in said Last Will and Testament and the First Codicil thereto.

(h) That under the provisions of said Last Will and Testament of said Homer McWilliams, and the First Codicil thereto, Corilanus Thorp, Jr., and The First National Bank of Kansas City, the plaintiff herein, were named as Co-Trustees of said trust; that thereafter and on February 23, 1968, Corilanus Thorp, Jr., died, and under the provisions of the Last Will and Testament and the First Codicil thereto, The First National Bank of Kansas City, this plaintiff, became the surviving and sole Trustee of the public charitable trust above mentioned and is now serving in such capacity.

(i) That the Executors of the Estate of Homer McWilliams, pursuant to the provisions of the Last Will and Testament of Homer McWilliams, deceased, have paid and delivered to the Trustees named in said Last Will and Testament substantial assets, far in excess of $15,000.00, which assets, together with certain real estate that passed directly, but conditionally, to said Trustees upon the death of testator, are now in the possession of and under the control of the plaintiff herein as sole remaining Trustee of said trust; that the plaintiff herein is now in a position to carry out the purposes of said trust and its obligations under said trust but is prevented from doing so because it cannot, with certainty and exactness, construe some of the language used by testator in his Last Will and Testament, and the First Codicil thereto, setting out the rights and duties of this plaintiff.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT II OF THE PETITION

1. The Court makes the following findings of fact as to Count II of the petition:

(a) That under the provisions of the public charitable trust above mentioned, this plaintiff, as Trustee, is required

to "appraise the properties of the trust immediately upon receiving the same," and is further required to transfer to the corpus of the trust out of income, from time to time, sufficient assets to restore the value of the corpus of the trust estate to an amount "equal to its original value as of the date said assets were received by and came into the hands of the Trustee."

(b) That said Trustees received title to and possession of the real estate owned by the said Homer McWilliams at his death, by operation of law at the death of the said Homer McWilliams, on December 21, 1965, subject, however, to the rights of the probate estate as provided by law; that said Trustees received a conditional title to the personal property owned by the said Homer McWilliams at his death, subject, however, to the rights of the probate estate, as provided by law, but did not receive actual possession thereof until it was distributed to it on various dates by the Executors of the Estate of the said Homer McWilliams.

(c) That the plaintiff herein cannot determine with certainty the exact meaning of the words "immediately upon receiving the same" and "at the time it was received by and came into the hands of the Trustees," or the dollar value of the assets received by it on said dates, since said Trustees received actual possession of part of said assets at different times and during different calendar years, and asks the Court to construe the meaning of said language.

(d) That the fair market value of the properties of the trust on December 21, 1965, was $8,485,891.22.

2. The Court makes the following conclusions of law as to Count II of the petition:

(a) That the original valuation of the corpus of the trust is required to be made by said Trustees as of the date of death of testator, December 21, 1965.

(b) That the fair market value of the properties of the trust on that date was $8,485,891.22.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff herein, as Trustee of the McWilliams Memorial Hospital Trust, shall establish as the original value of the properties of said trust the fair market value of said properties on December 21, 1965, to-wit, $8,485,891.22.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT III OF THE PETITION

1. The Court makes the following findings of fact as to Count III of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is required "at the end of each year," in case of loss or deterioration of the trust estate, to add to the corpus of said trust estate so much of the income accruing to said estate as will bring the corpus of the trust estate up to a value equal to its original value at the time it was received by and came into the hands of the Trustees.

(b) That the plaintiff herein cannot determine with accuracy the exact meaning of the words "at the end of each year" and asks this Court to construe said words and to determine their meaning.

2. The Court makes the following conclusion of law as to Count III of the petition:

(a) That it was the intent of said testator, as determined from the entire Will, that the words "at the end of each year" mean at the end of each calendar year.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee of said trust shall give to the words "at the end of each year" the meaning of "at the end of each calendar year."

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT IV OF THE PETITION

1. The Court makes the following findings of fact as to Count IV of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized to distribute the income from the trust estate annually for the maintenance and support of a designated class of hospitals operated and maintained on a non-profit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said hospitals born of white parents in the United States of America.

(b) That the plaintiff herein is unable to ascertain with certainty whether, under the law of Missouri, the words "and/or" are used in the conjunctive or disjunctive sense and are uncertain as to whether or not it may distribute all of the income of the trust estate exclusively to hospitals of the class described to the exclusion of distribution to patients of the class described, or vice versa, or whether such distributions must be made to both such hospitals and to such patients of the classes described in said Last Will and Testament, and asks this Court to construe said words and determine their meaning.

2. The Court makes the following conclusions of law as to Count IV of the petition:

(a) That it was the intent of said testator, as determined from the entire Will, that by the use of the words "and/or," this plaintiff was authorized to distribute all of the said income exclusively to hospitals of the class described, or to distribute all of said income exclusively to patients of the class described, or to make distributions to both such hospitals and to such patients of the classes described, all as the sole discretion of said Trustee shall indicate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the words "and/or," as used in said Last Will and Testament of the said Homer McWilliams and the First Codicil thereto, shall be used in the conjunctive sense and that the plaintiff herein, as Trustee, is authorized to distribute the income of said trust estate, as its sole discretion shall indicate, either exclusively to hospitals of the class described, or exclusively to patients of the class described, or it may divide such income between such hospitals or patients as its sole discretion shall direct.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT V

1. This Court makes the following findings of fact as to Count V of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized and directed to distribute income from the trust estate to "Protestant Christian Hospitals" and to certain patients in said hospitals "born of white parents"; that it is unable to determine with certainty what hospitals and what patients therein qualify as lawful beneficiaries

of the trust and whether or not the method of selecting beneficiaries of the trust set out in the said Will is legal.

(b) That it was the intention of Homer McWilliams, as evidenced by his use of the words "Protestant Christian Hospitals" in describing the hospital beneficiaries of the McWilliams Memorial Hospital Trust in his Last Will and Testament and the First Codicil thereto, that only such hospitals as have a special relationship to and at least some measure of control by a Protestant Christian church, and patients in such hospitals born of white parents were to be selected by his Trustee as beneficiaries of said trust.

(c) That the class of beneficiaries described as Protestant Christian hospitals is not indefinite, and that hospitals of that class can be ascertained and identified.

(d) That the Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all have a special relationship with and are at least partially controlled by a Protestant Christian church and are therefore qualified for selection by the Trustee as beneficiaries of the trust.

(e) That none of the other hospitals named as defendants therein have any special relationship to or control by a Protestant Christian church and are therefore not qualified for selection by the Trustee as a beneficiary of the trust.

(f) That the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion.

2. The Court makes the following conclusions of law as to Count V of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized and directed to distribute income from the trust estate to "Protestant Christian Hospitals" and to certain patients in said hospitals "born of white parents";

(b) That the class of beneficiaries described as Protestant Christian hospitals is not indefinite, that hospitals of that class can be ascertained and identified; and that the words "Protestant Christian hospitals" mean such hospitals as have a special relationship to and at least some measure of control by a Protestant Christian church.

(c) That the Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all have a special relationship with and are at least partially controlled by a Protestant Christian church and are therefore qualified for selection by the Trustee as beneficiaries of the trust.

(d) That none of the other hospitals named as defendants therein have any special relationship to or control by a Protestant Christian church and are therefore not qualified for selection by the Trustee as a beneficiary of the trust.

(e) That the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the words "Protestant Christian Hospital" as used in the Last Will and Testament of Homer McWilliams and the First Codicil thereto are construed to mean

those hospitals that have some special relationship to and at least partial control by a Protestant Christian church.

2. That the words "Protestant Christian" as used in said Will and Codicil thereto are not indefinite, and the class of hospitals intended can be determined.

3. That the selection of beneficiaries of the trust according to the provisions of said Will and Codicil thereto will not result in unlawful discrimination based on race or religion and is lawful.

4. That the Baptist Memorial Hospital, the Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all qualify as proper beneficiaries under the Will of Homer McWilliams and the First Codicil thereto, and none of the other defendant hospitals do so qualify.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT VI

1. The Court makes the following findings of fact as to Count VI of the petition:

(a) That under the Last Will and Testament of Homer McWilliams and the First Codicil thereto, the plaintiff herein, as Trustee, is authorized to "lease, sell, invest, reinvest and otherwise deal with the property of the trust assets," but said powers are not spelled out with particularity, and this Trustee cannot determine its lawful powers with certainty.

(b) That it was the intent of the testator, as determined from the entire Will, that the plaintiff herein, as Trustee, should have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and

to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

2. The Court makes the following conclusions of law as to Count VI of the petition:

(a) That it was the intent of the testator, as determined from the entire Will, that the plaintiff herein, as Trustee, should have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that The First National Bank of Kansas City, as Trustee, in dealing with the assets of the trust, shall have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the judgments herein entered on Counts II, III, IV, V and VI of said First Amended Petition, and each of them, are hereby specifically designated as final judgments for the purposes of appeal within the meaning of Section 512.020, Revised Statutes of Missouri, as provided in Rule 81.06.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Court retains supervisory control over the administration of the two trusts created by the Last Will and Testament and the First Codicil thereto of Homer McWilliams and orders and directs the Trustee to file herein an annual report, within 90 days after the close of each calendar year, setting out an accounting for each of said trusts for each such calendar year.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action shall be taxed against the plaintiff herein, to be paid out of the income of the Homer McWilliams Memorial Hospital Trust.

Dated this 10th day of October, 1973.

/s/ James C. Moore
Judge

A true copy

Attest:
Bruce R. Watkins, Circuit Clerk
By /s/ L. Umphery
D. C.

APPENDIX C

IN THE
CIRCUIT COURT OF JACKSON COUNTY
MISSOURI

No. 726091
Div. 9

THE FIRST NATIONAL BANK OF KANSAS CITY, a National Banking Association,
Plaintiff,

vs.

HONORABLE JOHN C. DANFORTH, ET AL.,
Defendant.

SUMMONS

THE STATE OF MISSOURI to Defendant ELIZABETH MAY JACKSON, 416 West 61st Street, Kansas City, Missouri.

You are hereby summoned to appear before the above-named court and to file your first amended pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon Hilary A. Bush attorney for plaintiff whose address is 1006 Grand Kansas City, Missouri all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the first amended petition.

Bruce R. Watkins,
Circuit Clerk
By /s/ Kathleen Richards
Deputy Clerk

Dated June 18th 1970.

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

No. 726,091
Division No. 9

THE FIRST NATIONAL BANK OF KANSAS CITY,
a National Banking Association,
Plaintiff,

v.

HONORABLE JOHN C. DANFORTH, Attorney General of Missouri, Jefferson City, Missouri, BAPTIST MEMORIAL HOSPITAL, DOWNTOWN HOSPITAL FOUNDATION, FLORENCE CRITTENTON HOME, KANSAS CITY GENERAL HOSPITAL & MEDICAL CENTER, KANSAS CITY COLLEGE OF OSTEOPATHY & SURGERY, LAKESIDE HOSPITAL ASSOCIATION, PLAZA HOSPITAL, INC., RESEARCH HOSPITAL AND MEDICAL CENTER, ST. JOSEPH'S HOSPITAL, ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI, THE WILLOWS MATERNITY SANITARIUM, INC., INDEPENDENCE SANITARIUM & HOSPITAL, KANSAS CITY LUTHERAN HOME & HOSPITAL ASSOCIATION, WESTERN MISSOURI MENTAL HEALTH CENTER, THE CHILDREN'S MERCY HOSPITAL, DOCTOR'S OSTEOPATHIC HOSPITAL, JACKSON COUNTY PUBLIC HOSPITAL, JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY, NORTHEAST OSTEOPATHIC HOSPITAL, NEUROLOGICAL HOSPITAL ASSOCIATION, SISTERS OF SAINT MARY, VETERANS' ADMINISTRATION HOSPITAL, WHEATLEY-PROVIDENT HOSPITAL, ELIZABETH MAY JACKSON, 416 West 61st Street, Kansas City, Missouri, MARY E. BLETHROADE, 400 North Grand, Sedalia, Missouri, and Unborn or Unknown Persons who are Heirs, Grantees or Successors of Homer McWilliams, Deceased,
Defendants.

FIRST AMENDED PETITION IN EQUITY TO CONSTRUE A PRIVATE AND A PUBLIC CHARITABLE TRUST

(Filed June 18, 1970)

ALLEGATIONS COMMON TO ALL COUNTS

Comes now plaintiff and in compliance with the Order of the Court entered in the above-described case on May 11, 1970, requiring that plaintiff file an Amended Petition adding as additional defendants all persons known to plaintiff, that may be entitled to any of the property of Homer McWilliams, Deceased, under the laws of descent and distribution of the State of Missouri; plaintiff does hereby file its First Amended Petition and states as follows:

1. That it is a national banking association duly organized and existing according to law and is lawfully vested with authority to exercise trust powers.

2. That defendant John C. Danforth is the duly elected and acting Attorney General of the State of Missouri, and in such capacity is the proper party to represent the citizens of Missouri in litigation involving the construction of a public charitable trust; that one of the trusts herein mentioned is a public charitable trust.

3. That defendants Baptist Memorial Hospital, Downtown Hospital Foundation, Florence Crittenton Home, Kansas City General Hospital & Medical Center, Kansas City College of Osteopathy and Surgery, Lakeside Hospital Association, Plaza Hospital, Inc., Research Hospital and Medical Center, St. Joseph's Hospital, St. Luke's Hospital of Kansas City, Missouri, The Willows Maternity Sanitarium, Inc., Independence Sanitarium and Hospital, Kansas City Lutheran Home and Hospital Association, Western Missouri Mental Health Center, The Children's Mercy Hospital, Doctor's Osteopathic Hospital, Jackson County Public Hos-

pital, Jewish Memorial Hospital Association of Kansas City, Northeast Osteopathic Hospital, Neurological Hospital Association, Sisters of Saint Mary, Veterans' Administration Hospital, and Wheatley-Provident Hospital constitute all of the licensed hospitals located in Jackson County, Missouri, known to plaintiff, and are named as defendants so that they may, if they choose to do so, submit evidence to the court, that they qualify to be considered by the Trustee as beneficiaries under the terms of the public charitable trust hereinafter described.

4. That defendants Elizabeth May Jackson and Mary E. Blethroade may be persons entitled to the property of Homer McWilliams, Deceased, under the laws of descent and distribution of Missouri or as heirs, grantees or successors of Homer McWilliams, Deceased, and are named as defendants herein for that reason.

5. That there may be unborn or unknown persons entitled to the property of Homer McWilliams, Deceased, under the laws of descent and distribution of Missouri, or as heirs, grantees or successors of Homer McWilliams, Deceased, and that all such unborn and unknown persons are included as defendants herein for that reason; that all of such unborn or unknown persons are unknown to this plaintiff so that the ordinary process of law cannot be served upon them and that by reason thereof service by publication as provided in Civil Rule 54.08 is required.

6. That Homer McWilliams died on December 21, 1965, and his Last Will and Testament, together with a First Codicil thereto, was duly admitted to probate in the Probate Court of Jackson County, Missouri, as Estate No. 99,800; that a copy of said Last Will and Testament of Homer McWilliams and the First Codicil thereto is attached hereto and made a part hereof and marked "Exhibit A".

7. That under the provisions of Article I of said Last Will and Testament, the said Homer McWilliams established a private trust for the purpose of providing perpetual maintenance for the place of interment of his parents and grandparents, all as more fully set out in said Will.

8. That under the provisions of Article XV of said Last Will and Testament as modified by the First Codicil thereto, the said Homer McWilliams also established a public charitable trust for the purpose of providing maintenance and support for certain charitable hospitals and needy persons, all as more fully set out in said Last Will and Testament and the First Codicil thereto.

9. That under the provisions of said Last Will and Testament of said Homer McWilliams and the First Codicil thereto, Corilanus Thorp, Jr. and The First National Bank of Kansas City, this plaintiff, were named as Co-Trustees of both of said trusts; that thereafter and on February 23, 1968, Corilanus Thorp, Jr. died, and under the provisions of the Last Will and Testament, and the First Codicil thereto, The First National Bank of Kansas City, this plaintiff, became the surviving and sole trustee of both the private trust above mentioned and the public charitable trust above mentioned and is now serving in such capacity.

10. That the Executors of the estate of Homer McWilliams, pursuant to the provisions of the Last Will and Testament of Homer McWilliams, Deceased, have paid and delivered to the Trustees named in said Last Will and Testament substantial assets, far in excess of $15,000.00, which assets, together with certain real estate that passed directly, but conditionally, to said Trustees upon the death of testator, are now in the possession of and under the control of this plaintiff as sole remaining Trustee of said trust; that this plaintiff is now in a position to carry

out the purposes of both of said trusts and its obligations under both of said trusts, but is prevented from doing so because it cannot, with certainty and exactness, construe some of the language used by testator in his Last Will and Testament, and the First Codicil thereto, setting out the rights and duties of this plaintiff.

11. That all of the allegations contained in Paragraphs 1 to 10 inclusive, hereof are common to the several counts of this petition and are incorporated in each of said counts as fully as if set out in full therein.

COUNT I

12. Plaintiff further states that in Article I of the Last Will and Testament of Homer McWilliams, the said Homer McWilliams created a separate private trust for the purpose of providing perpetual care of the places of interment of his parents and grandparents as more fully set out in said Last Will and Testament, but failed to designate in said Last Will and Testament or the First Codicil thereto, the nature or amount of assets which are to be set aside by his trustees out of the assets received from the Executors of his estate and allocated to the funding of said trust.

13. That it is necessary that his surviving Trustee, this plaintiff, know with certainty the amount it is required to set aside and allocate, out of the assets now in its possession, for the purpose of providing a sufficient corpus to fully fund said trust and enable it to carry out its duties as Trustee under the terms of said trust.

WHEREFORE, this plaintiff prays a decree of this Court construing Article I of said Last Will and Testament of Homer McWilliams and decreeing that Article I of the Last Will and Testament of Homer McWilliams created

a separate private trust for the purposes above mentioned and directing this plaintiff to allocate, set aside and hold in a separate account, as the original corpus of said trust, such assets as will, in the judgment of the Court, be sufficient to fully fund said trust, or for such other relief as shall seem meet and just to the Court.

COUNT II

14. Plaintiff further states that under the provisions of the public charitable trust above mentioned, this plaintiff, as Trustee, is required to "appraise the properties of the trust immediately upon receiving the same", and is further required to transfer to the corpus of the trust out of income, from time to time, sufficient assets to restore the value of the corpus of the trust estate to an amount "equal to its original value as of the date said assets were received by and came into the hands of the Trustee."

15. That said Trustees received title to and possession of the real estate owned by the said Homer McWilliams at his death, by operation of law at the death of the said Homer McWilliams, on December 21, 1965, subject, however, to the rights of the probate estate as provided by law; that said Trustees received a conditional title to the personal property owned by the said Homer McWilliams at his death, subject, however, to the rights of the probate estate, as provided by law, but did not receive actual possession thereof until it was distributed to it on various dates by the executors of the estate of the said Homer McWilliams.

16. That this plaintiff cannot determine with certainty, the exact meaning of the words "immediately upon receiving the same" and "at the time it was received by and came into the hands of the Trustees", or the dollar value of the assets received by it on said dates, since

said Trustees received actual possession of part of said assets at different times and during different calendar years; that it is necessary to know the exact meaning of said words and the dollar value of the estate when it was received by this plaintiff so that this plaintiff can comply with the provisions of the trust.

17. That this plaintiff believes it was the intent of said testator, as determined from the entire Will, that the original valuation of the corpus of the trust required to be made by said Trustees, was to be made as of the date of death of testator, i.e., December 21, 1965, on which date said Trustees came into possession of the real estate now constituting part of the corpus of the trust and became entitled to the personal property in the probate estate devised to them, subject only to the completion of probate proceedings.

WHEREFORE, this plaintiff prays a decree of this Court construing said Will and determining the dollar value of the trust estate at the time it was received by this plaintiff and directing this plaintiff to revalue said trust estate as soon as possible after the end of each year and to transfer so much of the income of the trust estate to the corpus of said trust estate at the end of each year, as shall be necessary to restore the corpus to the value as determined by this Court to be its value at the time it was received by this plaintiff, or for such other relief as shall seem meet and just to the Court.

COUNT III

18. Plaintiff further states that under the provisions of said public charitable trust above mentioned, this plaintiff, as Trustee, is required, "at the end of each year", in case of loss or deterioration of the trust estate, to add to the corpus of said trust estate so much of the income

accruing to said estate as will bring the corpus of the trust estate up to a value equal to its original value at the time it was received by and came into the hands of the Trustees.

19. That this plaintiff cannot determine with accuracy, the exact meaning of the words "at the end of each year".

20. That this plaintiff believes it was the intent of said testator, as determined from the entire Will, that the words "at the end of each year", mean at the end of each calendar year.

WHEREFORE, this plaintiff prays a decree of this Court construing said words "at the end of each year" to mean "at the end of each calendar year", or for such other relief as shall seem meet and just to the Court.

COUNT IV

21. Plaintiff further states that under the provisions of said public charitable trust above mentioned, this plaintiff, as Trustee, is authorized to distribute the income from the trust estate annually, for the maintenance and support of a designated class of hospitals operated and maintained on a non-profit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said hospitals born of white parents in the United States of America.

22. That this plaintiff is unable to ascertain with certainty whether, under the law of Missouri, the words "and/or" are used in the conjunctive or disjunctive and are uncertain as to whether or not it may distribute all of the income of the trust estate exclusively to hospitals of the class described to the exclusion of distribution to

patients of the class described, or vice versa, or whether such distributions must be made to both such hospitals and to such patients of the classes described in said Last Will and Testament.

23. That this plaintiff believes that it was the intent of said testator, as determined from the entire Will, that by the use of the words "and/or", this plaintiff was authorized to distribute all of the said income exclusively to hospitals of the class described, or to distribute all of said income exclusively to patients of the class described, or to make distributions to both such hospitals and to such patients of the classes described, all as the sole discretion of said Trustee shall indicate.

WHEREFORE, plaintiff prays a decree of this Court on Count III of this petition, construing the words "and/or" as used in said Last Will and Testament of the said Homer McWilliams, and the First Codicil thereto, to be used in the disjunctive and to authorize this Trustee to distribute the income of said trust estate, as its sole discretion shall indicate, either exclusively to hospitals of the class described, or exclusively to patients of the class described, or to make distributions to both such hospitals and patients, or for such other relief as shall seem meet and just to the Court.

COUNT V

24. Plaintiff further states that under the terms of said public charitable trust above mentioned, this plaintiff, as Trustee, is authorized to distribute certain income accruing to the trust as follows:

> ". . . in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now

constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. My Trustees shall not be confined nor limited in such contributions to such Hospitals as may be in existence at the time of my death, but may contribute to such hospitals of the character named, afterwards organized and in existence, and to the maintenance, support and care of patients of the class and character named in such hospitals. And I give my said Trustees, their survivors and successors, full power and authority to select, and to give these benefits of this Trust, and to make such distributions to, such Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of the Trustees, then acting, as they, their survivor and successor or successors, shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid."

25. That this plaintiff is unable to ascertain with certainty the meaning of said words and cannot determine with certainty which hospitals in Jackson County, Missouri, and which patients therein, qualify as possible beneficiaries of the trust. That certain hospitals in Jackson County, Missouri, are organized and operated as separate and independent not-for-profit or non-profit corporations, and in which patients of all religious faiths and races are treated, both for pay and as charity patients, which are in fact partially supported by, or advised and counselled by, or controlled by a church; that many of said hospitals have been granted exemption from payment of Federal and State income taxes after investigation and examination, on the grounds that they are non-profit organizations.

WHEREFORE, this plaintiff prays that the Court hear the evidence bearing upon this question and after hearing the evidence construe said Will and enter its decree designating which hospitals in Jackson County, Missouri, and which patients therein qualify as proper and lawful beneficiaries to which this plaintiff may make payments under the terms of said trust.

COUNT VI

26. Plaintiff further states that under the terms of both trusts created by the Last Will and Testament of Homer McWilliams and the First Codicil thereto, this plaintiff, as Trustee, is authorized to lease, sell, invest, reinvest and otherwise deal with the property of the trust estate, but that some of the language used by testator in said Last Will and Testament relating to said powers and duties of this plaintiff to so deal with the property of the trust estate are indefinite, obscure and precatory, and this plaintiff cannot determine with exactness what rights and duties it has in dealing with the property of the trust estates.

27. That this plaintiff believes it was the intent of said testator, as determined from the entire Will, that this plaintiff, as Trustee, should have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and to invest or reinvest, from time to time, the assets of the estate, in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

WHEREFORE, this plaintiff prays a decree of this Court construing said Will to mean that this Trustee has broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of, from time to time, any asset of

the trust estate and to invest or reinvest, from time to time, the assets of the estate, in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies, or for such other relief as shall seem just and meet to the Court.

Johnson, Lucas, Bush & Snapp
By /s/ Hilary A. Bush
1414 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
471-1160
Attorneys for Plaintiff

Copy of the foregoing mailed this 18 day of June, 1970, to:

Charles C. Shafer, Jr.
738 Lathrop Building
Kansas City, Missouri 64106
Attorney for Baptist Memorial Hospital

APPENDIX D

No. 58488

Circuit Court No. 726,091

IN THE
SUPREME COURT OF MISSOURI

September Session, 1974

The First National Bank of Kansas City,
Plaintiff-Respondent,

vs.

John C. Danforth, Attorney General of Missouri,
Defendant-Appellant,

and

Lakeside Hospital Association, Jewish Memorial Hospital Association of Kansas City, Research Hospital and Medical Center, Kansas City College of Osteopathic Medicine, Northeast Osteopathic Hospital, Sisters of Saint Mary (owning and operating St. Mary's Hospital), Kansas City General Hospital and Medical Center, and Childrens Mercy Hospital,
Defendants-Appellants,

and

Martin Luther King, Jr. Memorial Hospital,
Appellant,

and

Mary Elizabeth Blethroade Sutt, Elizabeth May Jackson, Carly McWilliams, and Casley McWilliams, Known Heirs, and the Unknown Heirs of Homer McWilliams, deceased,
Defendants-Appellants,

and

St. Luke's Hospital of Kansas City, Missouri, Kansas City Lutheran Home and Hospital Association, Baptist Memorial Hospital, and Independence Sanitarium and Hospital,

Defendants-Respondents.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants costs and charges herein expended and have therefor execution. (Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1974, and on the 13th day of January 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 27th day of March, 1975.

/s/ Thomas F. Simon
Clerk

(Seal)

APPENDIX E

No. 58488

Circuit Court No. 726,091

IN THE
SUPREME COURT OF MISSOURI

January Session, 1975

The First National Bank of Kansas City,
Plaintiff-Respondent,

vs.

John C. Danforth et al.,
Defendants-Appellants,

St. Luke's Hospital of Kansas City, Missouri, et al.,
Defendants-Respondents.

Now at this day the Court having seen and fully considered the motion of appellant John C. Danforth, Attorney General of Missouri, for a rehearing or in the alternative to transfer the above-entitled cause to Court en Banc, doth order that said motion be, and the same is hereby overruled.

Now also at this day the Court having seen and fully considered the joint motion of Lakside Hospital Association, et al., for a rehearing or in the alternative to transfer this cause to Court en Banc, doth order that said motion be and the same is hereby overruled.

It is further ordered by the Court that the motion of Known and Unknown Heirs for a rehearing and application for a transfer of this cause to Court en Banc, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete record entry of said Supreme Court, entered of record at the January Session thereof, 1975, and on the 10th day of February, 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of March, 1975.

/s/ Thomas F. Simon
Clerk

(Seal)